

**LABOR RIGHTS AND LEGAL, POLITICAL, ECONOMIC AND CULTURAL  
OBSTACLES IN GUATEMALA**

**by:**

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## 1. INTRODUCTION

After World War II, trade unions in Guatemala made several advances in the promotion of labor rights and labor conditions. During this period, union density increased and workers were protected by minimum wage laws and various types of social insurance. However, these advances were soon lost when a U.S. sponsored coup ousted democratically elected President Jacobo Arbenz in 1954. Under military rule, suppression of organized labor became a consistent feature of Guatemalan life and the social welfare developed over many years was destroyed. Wealthy land and business owners and their military allies tightened their grip on the country, its resources, and its workers.

Throughout the 1970s and into the 1980s, a harsh military campaign against a small guerilla movement provoked human rights violations on a massive scale. There were numerous documented reports of assassinations, torture and disappearances of trade unionists. In 1980, 27 leaders of the national trade union federation, the CNT, were kidnapped and disappeared. Two months later, the national police disappeared 17 leaders from a union meeting in Esquintla. At the regional and local levels, dozens of individual union leaders were assassinated and many more went into exile under threats of death.

The military nominally agreed to step aside in 1986 and, under the terms of a new constitution, a civilian government led by Christian Democrat Vinicio Cerezo declared guarantees of the rights to organize and bargain collectively. Guatemalan labor activists responded with increased activity, forming new unions and seeking to bargain with employers. They were often frustrated, however, by continued killings, assaults and threats, lax enforcement of labor law, a hostile judiciary, and continued employer resistance to unions. It was commonplace for trade union activists to be accused of links to the guerilla movement as a method of frightening them and their co-workers into abandoning union organizing.

The Cerezo administration was voted out in the 1990 elections, bringing businessman Jorge Serrano to the presidency in January 1991. Serrano campaigned on promises of economic development, especially in the maquila sector, by exporting apparel and electronics goods to the United States. Fierce employer opposition to union organizing, massive minimum wage and hour violations, hazardous working conditions, and widespread use of child labor marked industrial relations in this sector. The decades-old Labor Code contained a series of procedural hurdles that obstructed new union organizing and made most strike activity illegal. Minimum wage and child labor laws were poorly enforced.

Violence against trade union activists persisted, with documented cases of assassinations, disappearances, kidnappings, assaults, and threats. Civilian Self-Defense Patrols, created by the military ostensibly to confront guerilla forays, instead became instruments of rule by intimidation in the highlands. Peasants were pressed into service with the patrols and subjected to forced labor, building roads, barracks, and in some cases, vacation homes for military officers. On sugar, coffee, and banana plantations--which still dominated the Guatemalan economy and made up the bulk of the country's exports to the United States--union organizing was suppressed,

child labor was rampant, minimum wage laws were ignored, and toxic chemicals were used abundantly by farm workers who were not warned of their effects or given protective clothing or devices.

The civil conflict “ended” in 1996 with the signing of peace accords, which, inter alia, guaranteed the enjoyment of internationally recognized labor rights. However, Guatemala remains a country marked by continued violence against trade unionists. MINUGUA, the UN Mission in Guatemala, has documented several cases of violence, including murder, directed at trade unionists. These include threats to the head of UNSITRAGUA, as well as the attempted murder of the leader of the municipal workers union of Nueva Concepcion. On November 27, 2002, the bodies of Carlos Francisco Guzman Lanuza, the Secretary General of the Municipal Employees Union of Nueva Concepcion, and his brother were discovered on a highway near Nueva Concepcion. The General Central Union of Guatemalan Workers (CGTG) described death threats and other forms of intimidation received by a member of the municipal union of Chichicastenango, another member of commercial workers’ union of Chichicastenango (both from municipal officials), by two leaders of the Professional Heavy Truckers Union, and by the leader of the municipal union of Puerto Barrios. On May 13, the son of the leader of the National Federation of Public Servants (FENASEP) was killed. The deaths of Baudilio Cermenon Ramirez, from the Organization Secretary of the Light and Energy Union, and Oswaldo Monzon Lima, the secretary general of a fuel drivers’ union, have not been adequately investigated.<sup>1</sup>

Despite recent reforms to the Labor Code in 2001 and continued promises to enforce the law, largely brought about by continued pressure by the U.S. under the Generalized System of Preferences, the administrative and judicial systems are largely incapable of enforcing labor rights. Retaliation by employers, including the firing, threatening, and intimidation of union activists, remains common. Those who do take their cases to the labor courts and win their reinstatement are hindered by endless appeals by the employer or by the re-incorporation of the company as a different entity. Moreover, employers are only rarely punished for non-compliance with binding court orders.

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<sup>1</sup> The Inter American Commission on Human Rights has similarly denounced the violence directed at trade union leaders in Guatemala, finding such acts violate freedom of association as enshrined in Article 16 of the American Convention on Human Rights. See *Carlos Gomez Lopez*, Report No. 29/96, Case 11.303, Guatemala, Oct. 16, 1996 at ¶ 93 (“The Government of Guatemala has caused certain situations in which Mr. Gomez Lopez has been prevented from exercising his right of free association, and reprisals have been taken against him for activities undertaken in the exercise of this right.”). In 2002, the Commission again interpreted Article 16 in the context of trade union repression in Guatemala, finding that the Convention had been violated when the police, in collaboration with the owners of the finca “La Exacta,” took reprisals against a movement of rural workers. Government agents killed three men and seriously wounded 11 others. The reprisals were held to have been taken against the victims because of their union activities. See *Finca “La Exacta,”* Report No. 57/02, Case 11.382, Guatemala, October 21, 2002.

In its analysis of this subject, MINUGUA held a series of workshops in 2002 with interested stakeholders to identify problems in the administration of labor justice in Guatemala. Among the obstacles identified by participants were labor impunity, the lack of access and the delay in the application of justice, noncompliance with principles applicable to labor procedures, the insufficiency of jurisdictional organs, and the lack of solid conciliation procedures and institutions. See Administración de Justicia Laboral, p. 8 (part 1 attached hereto as Annex I).

The following report explores some of these issues, first by looking at the administrative and judicial process and explaining important bottlenecks in the process that hinder compliance with these rights. The report then continues with a right-by-right analysis, explaining the current situation of compliance with these rights and identifying common obstacles to enforcement.

## **II. PROCEDURAL OBSTACLES IN INDIVIDUAL RIGHTS CASES**

The delay in the application of labor justice is frequently cited as one of the greatest barriers to the enforcement of labor rights. In the non-union workplace, which is the vast majority, labor rights violations occur with greater frequency, such as in the maquila sector. Complaints filed by individual employees for violations of their labor rights proceed in two stages: the administrative conciliation process and the judicial process. As demonstrated below, the opportunities for inefficiency and delay are numerous.

### **A. The Labor Inspectorate**

Prior to filing a complaint with the courts, an individual files a complaint with the labor inspectorate, thus initiating the administrative conciliation process. There are three basic steps to this process.

*The Mercantile Registry:* When filing a complaint with the labor inspectorate, the first thing that should be done is to review the records that identify the proper name and address of the company against which the complaint will be filed. In many cases, owners use one or more commercial names with the purpose of confusing workers and, consequently, evade their legal responsibilities for the violations they commit. Therefore, it is necessary to consult the Mercantile Registry to obtain the correct information on the company.

*Complaint:* If a complaint has not yet been filed, the labor inspectorate will advise the worker on how and where to file his or her complaint and which documents ought to be attached. Because the process can be confusing to some workers, it is usually necessary to involve the inspectorate in the preparation of the complaint. In many cases, however, workers express distrust of the labor inspectors and feel frustrated by the way in which the inspectors handle the case. Some workers have also commented that the inspectors are biased in favor of the employers and thus do not try to ensure compliance with the law.

After filing the complaint and obtaining the wage calculation, the inspector summons the company within roughly 15 days to initiate conciliation. If the parties appear for this appointment, they have the opportunity to resolve the conflict without having to go before the labor courts, which is a very

long process. In cases of dismissal, the calculation of labor benefits is not always done in accordance with the law. This of course affects the negotiation of the payment of the wages, as labor inspectors significantly increase the amount demanded.

*Conciliation:* This hearing is known as the "Junta Conciliatoria," which is carried out fifteen days after the filing of the complaint with the labor inspectorate. In this hearing, the parties have the opportunity to negotiate the payment of the labor benefits with the manager or owner of the company. The labor inspector here serves as a mediator, proposing alternative solutions to the problem within the bounds of the labor legislation. If this conciliation produces a fair agreement on the payment of wages and benefits, an order is fashioned approving this agreement, and a date is set for its payment. If an agreement is not reached or if the representative does not appear at the hearing, then the inspector authorizes the exhaustion of the administrative conciliation process (ending the proceedings before the labor inspectorate) and the worker is informed that s/he has 30 working days to file the complaint before the labor courts.

However, during the conciliation hearing, the inspector does not always fulfill the role of mediator and conciliator, failing to offer fair and appropriate proposals to the parties. Rather, in many cases, inspectors tend to do nothing more than convene the hearing and close the session if the parties do not reach an agreement immediately. There are also occasions in which they do not send summons to the companies for the hearing on time, thus causing even greater delay as the second hearing is usually set for two to three weeks later.

## **B. The Labor Courts:**

After the last hearing before the labor inspectorate, a worker has 30 working days to present a complaint to the labor court, after which the worker loses his or her right to seek indemnification. As explained below, the process is grossly inefficient and is one of the primary reasons that workers with meritorious cases do not obtain an appropriate remedy.

### *Preparation of Complaint for Submission to the Labor Judge (Thirty Days After the Administrative Process Is Completed)*

The complaint is presented to the Auxiliary Center for the Administration of Justice, who is charged with sending the notice out to the 7 courts that operate in the capital city.

### *Notification of the Parties (Two Months from the Filing of the Complaint)*

If the complaint does not contain errors, there is an initial proceeding where, among other things, the date and hour for the hearing are set. When the defendant company is located in the capital, it is not usually a problem to serve notice on them, as the labor court completes the service itself. When the defendant is located in some other municipality, the notification is complicated because the labor court must send a notice to the peace officer of the municipality where the company is located

asking them to notify the company, after which the officer has to send a notice to the labor court notifying it whether the company was served.

However, there are frequent delays by the court in writing up the notices and, later, the peace officers often demonstrate little interest in notifying the companies, sometimes conditioning the service of process on the complainant actually driving them to the factory or paying for their taxi, because they consider these duties outside their normal activities. Additionally, they treat labor cases with much less importance than penal cases.

There also are occasions in which they return the notices without having notified the defendant, arguing that they had not been able to find the company or that the address was not exact. In other cases, the officers return the notices after the time for service has expired, that is, the date for the hearing arrives and the labor court does not know whether the company was notified or not, causing the hearing to be cancelled. Therefore, it is usually necessary to accompany the officials to ensure that the notifications are served so that the completed notices return to the labor courts on time.

### *Hearing*

*(Three to Four months after Submission of the Complaint)*

This hearing is set approximately three months from the filing of the complaint. This is accomplished in distinct phases, which are: the ratification of the complaint, the answer by the defendant, a conciliation phase and, if the parties do not reach an agreement, presentation of the evidence. If in the conciliation phase the parties reach an agreement on pay that does not violate labor norms or acquired rights, then the judge issues an order approving the agreement and the case is closed. In the best case, the defendant shows up at the hearing to conciliate the case quickly as opposed to proceeding to trial. However, defendants often do not attend the hearing, making the excuse that they were ill and then requesting that a new hearing date be set. Also, before or during the first hearing, employers raise a series of objections that further delay the process, such as jurisdictional conflicts, defective complaints or misrepresentation of the facts, or that the summoned company is not the company that employed the complainant (which occurs because they use two or three names).

### *Sentence*

*(Five to Six months later)*

After the hearing, the evidence is analyzed and the court issues a decision. This sentence must be sent to the parties. In this stage, the party that disagrees with the decision has the right to appeal the case. This stays the proceeding before the trial court and elevates the case to a court of appeals to review the order in light of the evidence and can decide to confirm or revoke the order (this process takes 2 to 3 months). The process is elongated by frivolous and frequent appeals.

### *Preparation of Damages Calculation*

*(Eight to Nine Months Later)*

Once liability is established, calculation tables for labor benefits are consulted which include payments for damages on top of the initially demanded amount. This calculation is also served upon the parties.

#### *Notification And Requirement Of Payment (Ten to Eleven Months Later)*

Once the payment amount is settled, that is after having been notified of the amount, one must then demand payment from the company. If at the time of requiring payment the company refuses to pay, one can seize goods in an amount that is adequate to cover the judgment or one can seize any bank accounts the company may have. However, it is necessary to have the bank account numbers in order to seize the accounts. The labor judge must solicit information from all of the banks, which will then inform the court if the company has assets adequate to satisfy the judgment. The limitation here is that companies do not register bank accounts in their name but rather in the name of individuals. The same problem arises with the seizure of goods, because frequently the machinery or real estate is not the property of the company but instead is rented or leased.

#### *Collection of the Seized Money or Goods*

If the court manages to seize bank accounts, one requests an order from the court effectuating the transfer of the sums necessary to cover the judgment.

The failure of the administrative and judicial procedure to function efficiently, including the ease at which the employer can manipulate the process, demonstrates in the abstract why obtaining labor justice can be a near impossibility. The following sections look at the state of compliance with internationally recognized workers rights in Guatemala, with an eye toward problems specific to seeking appropriate remedies when such rights are violated.

### **III. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING**

#### **A. FREEDOM OF ASSOCIATION**

##### *a) Background*

Today, the economically active population in Guatemala stands at about 4.9 million people, with a rate of participation of 60.70% for men and 42.70% for women. Of those, only 28.70% work in the formal sector of the Guatemalan economy. According to data provided by the Ministry of Labor, 56% of the formal sector is organized, of which 33.5% are in the public sector and 22.5% in the private sector. From 1947 until today, there have been 1,665 officially registered unions. Currently there are 364 active union; of that number, 141 are in the public sector (77 unions in the central government and 64 unions in municipal government) and 223 in the private sector. In addition, there are 55 registered federations and of confederations.

In April 2002, the Ministry of Labor worked through the General Labor Inspectorate to create a record of complaints submitted by labor unions. They received 83 complaints in 2002 and 65 complaints from January to October 2003. These complaints, broadly characterized, concern: negotiation of collective bargaining agreements, changes to conditions of work, retaliation against unionized workers, unjustified mass dismissals, retained wages and illegal withholdings, refusal to grant vacations, and forcing workers to attend company meetings during which management threatens dismissal. The majority of the complaints, however, concern issues related to the negotiation of collective agreements and retaliation against unionized workers. Additionally, since 2001, the labor courts have maintained a database of complaints, which totaled 3,525 in 2001, 3,130 in 2002 and 1884 from January to September 4, 2003.<sup>2</sup>

*b) National Labor Laws*

The Guatemalan Constitution and Labor Code recognize the right to freely associate and bargain collectively. Articles 34 and 102 (q) of the Constitution expressly provide that workers may freely associate without discrimination or previous authorization from the government.

*Article 34: Right of Association.* The right of free association is recognized. No one is obligated to join groups or associations for mutual self-interest.

*Article 102 (q): The Right to Freely Unionize.* This right will be able to be exercised without any discrimination and without being subject to prior authorization, having only to comply with the requirements established by law. Workers cannot be fired for participating in the formation of a union, enjoying this right from the moment in which they inform the General Labor Inspectorate.

The Labor Code further elaborates on these basic protections. For example, Article 10 of the Labor Code specifically prohibits any kind of retaliation against workers with the aim to totally or partially prevent the exercise of the rights granted under the Constitution, the Labor Code or any other labor laws. Importantly, in 2001, the Labor Code was amended in several respects concerning the right of freedom of association. Article 209, amended by Article 4 of Decree 18-2001, provides that workers cannot be dismissed for participating in the formation of a union (*fuero sindical*). Such workers enjoy immunity from dismissal from the moment in which they give notice in writing to the General Labor Inspectorate that they are forming a union and will enjoy this protection up to sixty days after the inscription of same. Moreover, if the employer does not comply, the worker must be reinstated within 24 hours and the responsible employer will be sanctioned with a fine equal to 10 to 15 minimum monthly wages (non agricultural

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<sup>2</sup> According to a study by Miguel F. Canessa Montejo on the complaints submitted to the ILO, between 1994 and 2002, 21 cases concerning violations of trade union rights in Guatemala were decided by the Committee on Freedom of Association, the majority concerning the death, disappearance or threats to union leaders and workers (9 cases) and anti-union dismissals of leaders and workers (12 cases).



labor), as well as to pay the wages and benefits that are owed. If the employer persists in this conduct for more than seven days, the fine will increase by 15%.

With respect to the right to bargain collectively, the Constitution, in Article 106, provides that labor rights are inalienable, meaning that the rights outlined therein cannot be waived by workers or bypassed through individual or collective contracts, and any such provisions would be void, even if expressed in a collective or individual contract of work or other document. Furthermore, in the case of any ambiguity as to the interpretation or scope of the law or contractual provisions with regard to labor, they will be interpreted in the light most favorable to the workers.

Guatemalan labor law has developed significantly over the years, and many of the national labor laws meet the minimum standards articulated in the ILO conventions, particularly after the 2001 reforms were enacted. Through Decrees 13 and 18, these reforms generated advances for exercise of trade union rights, including the obligation of the Executive to set annual minimum wages, the limitation or prohibition on state interference in union activities (Art. 211), increased fines for dismissing workers involved in organizing unions (Art. 209); eliminating the prohibition on strikes during the harvest (Art. 243); applying contracts and collective agreements to all of the workers of the company and not just to the members of the union (Art. 214); and authorizing labor inspectors to impose administrative penalties (Art. 269).<sup>3</sup>

This said, however, there are serious deficiencies in the existing legislation with regard to the subject of freedom of association and collective bargaining.

- 1) Under Article 220 of the Labor Code, only persons of Guatemalan origin can constitute or be members of a union and its executive committee. Indeed, the articles of incorporation of a union must contain, according to Article 220(d) (as amended by Article 2 Decree 13-2001), a declaration that the members of the Provisional Executive Committee are of Guatemalan origin. This contravenes Article 2 of ILO Convention 87, as said convention establishes the right to constitute organizations without distinction and previous authorization.
- 2) For public sector workers, there are still serious concerns regarding the right of free association and collective bargaining. Although the law recognizes the right of state workers, and workers in decentralized and independent organizations, to strike, such right may only be exercised if it does not affect the provision of essential public services. However, that same law states that essential public services include education, postal services, transportation and the generation and distribution of fuel. Essential public services ought to be considered only those services whose interruption could endanger the life, security, personal health or conditions of

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<sup>3</sup> It is important to note that international pressure is cited as a predominant factor that influenced the passage of these reforms. The pressure exerted by the United States through its threat to remove Guatemala from the list of beneficiary countries under the General System of Preferences was critical.

existence for the population.

- 3) Moreover, with regard to the right to strike, Article 241 of the Labor Code requires 50 per cent plus one of those working in the enterprise (without including in the total workers in positions of confidence or who represent the employer) to call a strike. Additionally, unions must submit to compulsory arbitration without the possibility of resorting to a strike in public services that are not essential in the strict sense of the term. Unions are also prohibited from undertaking sympathy strikes.
- 4) Even the latest reforms fall short of the ILO's recommendations in key aspects. According to the AFL-CIO, "While the law was improved by affording agricultural workers the right to strike during the harvest, there is no evidence that workers in the countryside (where impunity is most pronounced) have been able to exercise this right in any meaningful way. Indeed, this provision is undermined by the President's broad discretion to ban strikes in "essential economic activities," while a highly burdensome requirement is established for the formation of industrial unions – 50% plus one of all workers in the industry."

### *C. Non-Compliance with the Labor Code*

In 2002, MINUGUA published a thorough summary of ILO jurisprudence on freedom of association in Guatemala. *See Libertad Sindical en Guatemala* (MINUGUA 2002). With regard to the exercise of those rights, MINUGUA has made several useful observations worth mentioning here.

#### *Assassinations, Disappearances, and Threats*

One of the most troubling issues is the assassination and disappearance of leaders or workers for their union activity. The ILO has noted the existence of a climate of impunity as is reflected in the assassination, disappearance or threats against unionists, which constitutes a serious obstacle to the exercise of trade union rights and that such acts demand strong measures on the part of the authorities, such as the undertaking of independent judicial investigations. The ILO has observed that the government has not commenced prosecutions or done what they are capable of doing to find those responsible.

#### *Anti-Union Discrimination*

The ILO has observed with concern the high number of allegations relative to dismissals and other acts of anti-union discrimination that affect numerous union leaders, unionists and workers for the exercise of their union activities. The existence of legislation that prohibits acts of discrimination is not sufficient if not accompanied by efficient procedures so that the laws are complied with in practice. It is at least difficult, if not impossible, for a worker to prove that he has been the victim of a measure that constitutes anti-union discrimination. The committee has also emphasized that the absence of penalties against those responsible has brought about

impunity that has aggravated the climate of violence which is extremely harmful to the exercise of trade union rights.

### *Union Registration*

In Guatemala, the denial of union registration has been one of the methods of state intervention that has aimed to control organized workers. Without union registration, the union finds it impossible to be considered a legal subject of those rights, and as such, cannot exercise those rights. This demonstrates a link between union registration and the legality of union activity, especially collective bargaining. Public sector workers have suffered the majority of cases of rejection or loss of union registration.

#### *D. Examples of Non-Compliance in Guatemala*

Among the most frequent violations of the right to freely associate and bargain collectively is the dismissal of workers who are attempting to or have formed a union. Workers who try to vindicate their rights, which include freedom from termination for 60 days following the formation of the union, are rarely successful, as the following cases illustrate.

##### *1. Portuaria Santo Tomas de Castilla, Puerto Barrios, Izabal.*

On April 6, 2003, workers formed the Union of Stevedores, Loaders, Unloaders and Other Services of the Company Portuaria de Santo Tomas de Castilla (*Sindicato De Trabajadores Estibadores, Cargadores, Descargadores, Y De Servicios Varios De La Empresa Portuaria De Santo Tomas De Castilla*), SITREPSTC, sending notice of the formation of the union to the Inspector General of the Ministry of Labor on April 8. The Labor Inspectorate recognized the legal personality of the union by Resolution 25-2003 on April 17, which was published on April 25 in the official gazette. Shortly thereafter, 16 trade unionists were fired. . Of the dismissed workers, 14 we informed verbally and only two in writing. Five of them were dismissed on April 30 and the other 11 on May 5. On May 27, Miguel Arturo Orellana and other petitioners filed individual complaints with the proper authorities for their dismissal, which was done verbally and directly. The complaints were admitted and were later consolidated in a single action.

Adiel Yanes Barrera and Manuel Hernandez Barrientos, members of said union, were fired in writing on April 30, 2003. They reported this to the Labor Inspectorate with the hope of enforcing their right of immunity from dismissal and consequently gaining their reinstatement. However, the employer failed to appear at the hearing; indeed, the employer failed to appear at the following two hearings set by the inspector to mediate and reach an agreement on the immediate reinstatement of the workers. Later, two new hearings were set for a “*junta conciliatoria*” that were carried out in the offices of the Ministry of Labor. The employer did not attend either hearing, clearly demonstrating that they had no desire to discuss or conciliate the matter. The administrative process was thus exhausted, giving the workers the right to proceed to file a complaint with the corresponding labor judge.

## 2. Tomza Corp.

The Union of Packaging, Transport, Distribution and Maintenance Workers at Tomza Corp. had been inactive. However, on July 15, 2003, 92 workers decided to reorganize the union and chose a new board of directors. The following day, the company dismissed 13 workers, giving them a note indicating that the reason for their dismissal was the reorganization of the union. Six other workers were threatened and forced to sign a resignation letter. A complaint was filed with the General Labor Inspectorate, and on July 25, an inspector went to the company to seek the reinstatement of the dismissed workers. The employer refused to do so, and an administrative conciliation hearing was set for August 6. The company unofficially proposed to pay the wages to the dismissed workers before the start of the hearing, but the offer was rejected as such a remedy would not address the issue, namely that the workers had been dismissed illegally simply for reactivating their union.

Moreover, two union leaders on the new committee received death threats by telephone. Another found a funeral arrangement by the front door of his house and yet another was followed by a vehicle and, while stopped at a traffic light, was assaulted by three men who got out of their truck and aimed their firearms at his head.

## 3. Salama Horticultural Workers

Salama Horticulture in Baja Verapaz illegally fired 52 workers who were attempting to organize a union on August 27, 1997. Despite a ruling from the Guatemalan Supreme Court in 1999 ordering their reinstatement, the employer has not allowed them to return. These workers have been seeking reinstatement for over four years.

## 4. Finca Maria Lourdes

At the Finca Maria Lourdes in Quetzaltenango, 55 workers have been illegally fired since 1995. The labor court has issued seven separate resolutions ordering reinstatement for the fired workers. Each resolution explains that the workers were fired in violation of Article 209 of the Guatemalan Labor Code, which stipulates that workers fired without proper authorization must be reinstated within 24 hours. However, not one of the reinstatement orders has been enforced.

### *E. Obstacles to Enforcement*

#### *Delay:*

One of the most common obstacles is the length of time it takes to resolve labor conflicts. In the case of STREPSTC, noted above, the notice of the complaint was not sent until June 11, meaning that the notification was delayed 15 days. The law contemplates that this should be undertaken on the following day.

### *Influence:*

It is apparent that there is a marked traffic of influence by well-known lawyers and businessmen on the Ministry of Labor. Former inspectors, who take advantage of their relationships with current officials, influence inspectors to adopt the position of the companies for whom they now consult.

### *The Non-Application of International Norms:*

The labor tribunals of the first instance, in addition to administering justice in accordance with the law, has to observe the principles that inform the rights of work, many of which are found in the Constitution and which are also protected under the international labor conventions. As UNSITRAGUA has noted, “we can say that the deficiencies in labor justice don’t stem from the laws themselves but from the application of the laws, the institutions and principles that are attributable to the operation of labor justice. These deficiencies take form in the following ways:

- Labor judges’ unfamiliarity with the international labor conventions in effect in Guatemala.
- Misapplication of judicial criteria, which at times contradict the express text of the law.
- Protection of employers by the judges, particularly in collective conflicts of an economic/social nature.
- Malicious delay of the judicial process.
- Abuse of the amendment of the proceedings.
- The failure of the courts to order effective temporary measures to defend the rights of the workers.
- Labor courts’ inability to execute appropriate resolutions, especially concerning reinstatement.
- Non-compliance with labor regulations.
- The requirement of conditions, without legal basis, in legal proceedings on labor matters.
- The predisposition on the part of the judges and persons of the judicial body, with rare exceptions, against trade unionism.

## **B. COLLECTIVE BARGAINING**

Similarly, MINUGUA summarized years of criticism and several complaints with regard to the right to organize and bargain collectively as follows: Guatemala cannot be characterized as one that either respects or promotes collective negotiation. On the contrary, the complaints evidence an environment unfavorable to collective negotiation. In many cases, the rejection of petitions is accompanied by the dismissal of workers that promote the collective negotiations. Additionally, the complaints for violation of collective negotiation law and principles show the serious difficulties that workers suffer, in particular public sector workers, in the ability to exercise their right to present a *petition* and negotiate in good faith.<sup>4</sup>

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<sup>4</sup> The procedures for resolution of collective conflicts are set forth in Section 11.

### *The Case of Unorganized Workers*

#### 1. Universidad Rafael Landivar.

On March 25, 2003, 75 workers of the Universidad Rafael Landivar met to review their conditions of work. As a result, they decided to file a petition with the employer through the Sixth Labor Court. In this action, they were represented by delegates of the ad-hoc committee of allied workers. The complaint was accepted for process and thus prevented the parties from taking any retaliatory measures, as to do so would be sanctionable.

The employer submitted an exception to the petition, claiming that the ad hoc committee did not comply with the requirements set forth in the law, such as: 1) exhausting the direct adjustment (arreglo directo); 2) serving the employer with the petition; 3) proving that they constituted 2/3 of the employees working at the university; and 4) showing that they represented all of the workers. The labor judge accepted these exceptions and gave the petitioners 10 days to rectify them.

The ad hoc committee appealed that decision and the court of appeals decided in their favor, holding that the judge should not have requested the requirements enumerated because they lacked a legal basis. The employer continued to raise exceptions, making plain that they did not want to negotiate or conciliate the matter.

### *Inefficiency of the Labor Judges*

In this case, the judge demanded that the ad hoc committee exhaust the direct method before proceeding to the judicial process. This has no basis in the law and can only be demanded of a trade union and not non-unionized allied workers. This issue has yet to be clarified by the First Chamber of the Labor Court of Appeals.

### *Length of the Process*

The complaint was filed on March 27, 2003, and, to date, there has been no decision from the court as to whether the ad hoc committee has legitimacy and the right to negotiate on behalf of the workers of that employer

### *The Case of Unionized Workers:*

The Negotiation of a Collective Agreement Between Sindicato de Trabajadores and Empresas LA COMERCIAL S. A. and Distribuidora de Productos Alimenticios Diana, S.A. and other companies that form part of the same economic group.

Through a written notice on April 4, 2003, the Executive Committee of the Union submitted a collective conflict to the 6<sup>th</sup> Judicial Court, wherein they indicated that the conflict was supported by the members of the union, specifically by 100 of the 190 workers. This was accompanied by,

among other documents, a resolution of the Labor Inspectorate from September 11, 2000 in which they noted receipt of the draft agreement to be discussed in the via directa; a document dated September 12 2000, authorized by labor inspector Byron René Muñoz Pérez, by which they notified the company of the draft of the collective agreement of conditions of work for its negotiation and a document dated September 13 in which they notified the union.

The judge accepted the case for further procedures and prohibited the parties, the employer above all, from taking retaliatory measures under penalty of sanctions with a fine equivalent to between 10 and 15 minimum monthly salaries and by arrest of 15-30 days, depending upon the type of retaliation and the number of persons affected. Also, the parties were informed that any termination of the work contracts would have to be authorized by the labor judge familiar with the conflict. Notwithstanding this, the employer fired several workers and undertook a series of steps against the resolutions promulgated by the court. Among them we find a petition for a nullity and an appeal.

a) Obstacles in the Process of the Conflict:

Judicial

As apparent in the resolutions of the judge, there were several causes for the delay in the adjudication of this case. These include demanding compliance with non-existing requirements before the continuation of the process, due to a series of errors committed in the issuing of certain resolutions, requiring the revocation of some and amending the terms in others. Insistence on requirements put the entire process at risk because non-compliance with them would have terminated the judicial process and lifted the prohibitions set forth by the judge. In other words, the company could dismiss the workers without needing to obtain authorization.

Obstacles by the employers:

The legal representative, on April 21, 2003, raised their objections to the collective conflict, requesting that it be considered terminated, arguing that they already had two conflicts and that the same workers had ratified the collective agreement in effect from November 29, 2002, with a term of three years. Other arguments utilized were that they had not exhausted the direct method of conflict resolution; that the company summoned lacked legal personality (because the entity was called La Comercial, Sociedad Anónima and not as set forth by the workers in the initial filing, "La Comercial Sociedad Anónima y Distribuidora De Productos Alimenticios Diana", Sociedad Anónima and other companies that formed a part of the same single economic entity); and that they lacked the legal number of unionized workers.

The representative also filed for a nullity because the judges partially revoked a resolution; they argued that the judge violated the law in partially revoking the order himself. Also, the employer filed a motion requesting that the court lift the preventive measures made in the first resolution (to not take retaliatory measures and not to fire the workers without prior authorization of the

court). This was done in order to dismiss the workers without the need to request authorization from the court.

In another motion to the judge, accompanied by a certificate from the mercantile registry, the company argued that the entity "Distribuidora de Productos Alimenticios Diana Sociedad Anónima", did not appear in the mercantile registry and therefore alleged that the plaintiffs belonged to a union of a non-existent company.

#### The Union Response

Concerning the judge's requirement to authenticate the number of workers that are affiliated to the union, the union argued that Article 381 of the Labor Code does not so require. In order to avoid prolonging the proceeding, notwithstanding the judge's misinterpretation of the law, the union complied under protest with this requirement. Further, regarding the judge's requirement to identify the number of workers who supported the conflict, the union argued that they had already complied with that requirement in the initial writing. In any case, the union again provided information indicating that there were one hundred workers in support.

On June 23, the judge notified the parties of his June 20 decision lifting the preventative measures against the company, causing the union to file an appeal. On June 24 they were notified of the resolution granting the petition of appeal. On September 30, the third chamber of the court of appeals dismissed the petition for appeal filed by the union and confirmed the decision of the 5<sup>th</sup> labor judge. The magistrates of this chamber considered that everything that had previously taken place had been resolved in conformance with the law. As such, the case ended. The union is considering whether to initiate an appeal for legal protection (amparo) in order to continue with the process.

#### e. **ADDITIONAL OBSTACLES IN THE PROCESS OF COLLECTIVE CASES:**

##### *Labor Inspectorate:*

Among other factors, labor inspectors fail to act as mediators and conciliators between workers and employers. Some inspectors are also ignorant in matters of collective bargaining. In cases concerning the reinstatement of dismissed workers, the company will, in many cases, prohibit the entry of labor inspectors into the workplace, thus preventing the reinstatement of the worker. The inspectors also limit themselves to merely putting this matter on the record and allowing the administrative process to be exhausted. Importantly, inspectors have the legal ability, provided them under Article 281(c) of the Labor Code, to request the aid of public authorities or police in cases where company blocks entry or otherwise prevents the inspector from completing his duties. However, inspectors rarely exercise this power.



### *Labor Courts:*

The lack of established criteria and the poor interpretation of the labor code by the labor judges is a persistent problem. For example, some judges obligate non-unionized workers to exhaust the “direct route”, when this is obligatory only in cases of organized workers in the process of negotiating a collective bargaining agreement. Similarly, judges impose other requirements that are not found in the Labor Code, such as requiring an indication of how many workers support contract negotiations.

Concerning the fulfillment of filing requirements for complaints, many requirements are not fulfilled out of ignorance of the rules, or lack of professional advice, or at times intentionally, as a strategy by workers to freeze the status quo. When a company is served with a complaint, the employer cannot terminate the labor contract without authorization. All of these factors affect the advance of contract negotiations.

In the cases of dismissal, judges normally require that the worker certify the dismissal; however, dismissals are not always given in writing. Additionally, workers are asked to prove that they once had an employment relationship with the company. In other cases, when the dismissal is against a union leader, judges sometimes apply procedures that do not govern dismissal of a trade union leader.

### *Conciliation and Arbitration Tribunals:*

These tribunals are permanent and should be constituted throughout the year (Art. 293 of the Labor Code). In practice, however, they are not and are instead only convened when necessary. The ad hoc nature of the conciliation and arbitration tribunals affects the process of these conflicts. Indeed, it often takes much additional time just to convene the members of the tribunals, who often make excuses that they are travelling or are ill. The delay also favors the employers by giving them more time to raise all sorts of judicial hurdles against the complainant, such as defects in the complaint and conflicts of jurisdiction.

## **IV. ELIMINATION OF FORCED LABOR AND OBLIGATORY OVERTIME**

### *A. Background*

In Guatemala, there are no recorded complaints of forced labor. However, although it is not forced labor in the strict sense, compulsory overtime is frequently encountered in Guatemala. Between January and October of 2003, 22 complaints were filed concerning forced overtime and 13 complaints filed for non-payment of overtime wages, from a total of 641 registered complaints. It is necessary to clarify, however, that this number does not reflect the number of women who are dismissed for refusing to work beyond the ordinary work day, nor those who are forced to resign, nor those who are dismissed for complaining of abuse. Many of these cases originate in situations of forced overtime. Also, the number of complaints does not represent the magnitude or the reality of the conditions in the maquilas, because the majority of the workers

simply do not file complaints. As doing so would put their jobs at risk, many women have accepted the 12 to 16 hour workdays and partial payment for their work. As the workers themselves affirm, it is better to have work and endure the grueling hours than have no work at all.

COVERCO, a leading independent monitoring organization based in Guatemala City, has noted in its public monitoring reports that workers frequently complain of being pressured to work overtime against their will. As recorded in the 1999 Public Report of Liz Claiborne, COVERCO wrote:

We have received numerous reports of management and peer pressure for workers to work overtime. The management pressure is usually described by workers as threats of dismissal or invitations by supervisors to submit their resignations. The peer pressure comes from fellow workers, who complain that those who don't work overtime undermine the efforts by the entire line to meet the high production goals required to qualify for production bonuses. In response the factory has informed COVERCO that at the start of each wage period workers are asked if they are willing to undertake overtime. Those that wish to work overtime sign a form to this effect. The disorganized state of the personnel files has prevented effective verification of this issue. COVERCO received 54 complaints from workers who claimed they were pressured to work overtime.

p. 19.

A similar incidence of complaints from workers producing garments for the Gap was reported. In its Gap report, they noted that:

COVERCO received 78 individual and collective complaints that management frequently pressured workers to work additional overtime. If they refused, management denied them access to a number of benefits, including: loans, use of sports facilities and production bonuses. Other workers complained that some supervisors pressured workers to return to work at 12:30 without additional pay in order to reach their production quota.

This has lead COVERCO to recently conclude that, "Some compensate for poor planning, inefficiency, or lax quality control by the cyclical use of massive overtime and harsh discipline." See COVERCO, A View From Guatemala, Sept 17, 2002.

#### *B. Examination of National Law*

##### *The Constitution*

The Constitution establishes that "no person can be submitted to servitude or any other condition that reduces their dignity." It also provides that "work is a right of each person and a social

obligation. The labor relations of the country should be organized according to principles of social justice” and the recognition of the right of free choice of employment and satisfactory economic conditions that guarantee to the worker and his or her family a dignified existence. Additionally, the Constitution provides that the ordinary workday cannot exceed eight hours a day, nor forty-four hours a week, equivalent to forty-eight hours for purposes of the payment of wages. Night work cannot exceed six hours daily, nor thirty-six hours a week. In the case of a mixed workday, it cannot extend beyond seven hours a day.

### *The Labor Code*

The Labor Code echoes the same standards with regard to hours of work and its remuneration as the Constitution. For example:

#### *Article 121*

Work performed outside the time limits established in the prior articles regarding the ordinary day of work, or that exceeds a lower limit that the parties agreed to by contract, constitutes overtime and must be paid with at least an additional 50% of the minimum wage or higher if the parties have so stipulated.

#### *Article 122*

The extraordinary workday cannot exceed a total of 12 hours, except in very limited circumstances that are set out in regulations or due to an accident or an imminent risk that endangers the people, establishment, machines, installations, products or harvest and, without evident detriment, it is not possible to substitute other workers or suspend the work of those that are already working.

The employer is prohibited from ordering or allowing his employees to work overtime in work that is by its nature unhealthy or dangerous.

In the case of a public catastrophe, as governed by the same exception in the first paragraph of this article, the extraordinary work must always be necessary to prevent or attenuate the calamity. In these circumstances the work done ought to be paid as ordinary work.

#### *Article 123*

Employers must record in their payroll records, setting aside that which is considered ordinary work, that which is paid to each one of its workers for overtime.

#### *Article 124*

The following are not subject to the limitations of the ordinary work schedule:

- a) Employer representatives;
- b) Those that work without immediate supervisory control;
- c) Those that occupy guard positions or which require no additional presence;
- d) Those that work outside of the area in which the company is located, as commissioned agents that have the character of workers; and
- e) Other workers that perform work that by its nature are not performed during work days.

However, these persons cannot be forced to work more than 12 hours, except in very limited circumstances that are set forth in the respective regulations, with overtime pay for labor in excess of 12 hours a day.

With regard to domestic work, however, the Labor Code makes an exception:

#### *Article 164*

Domestic work is not subject to limitations on the hours or days of work, and Articles 126 y 127 are not applicable either. However, domestic workers enjoy the following rights: they must be able to enjoy a rest period of an absolute minimum of 10 hours a day, of which at least 8 must be at night and continuous and 2 should be set aside for meals; during Sundays and holidays they ought to enjoy an additional 6 hours of paid rest.

#### *C. Examples of Non-Compliance with Law*

Frequently, workers who refuse to work obligatory overtime are dismissed. The case of Irma Yolanda Pineda Alarcón, for example, is the case of any one of the thousands of women in the maquila sector. Irma was 33 years old and a mother of 7 children between the ages of 9 months and 16 years old. She began to work at Elite, S.A. on February 10, 2003 and was dismissed a few months later on May 26 for not having worked additional hours at night. Irma's youngest daughter was ill and Irma had to take care of her. Irma also claimed that one of the "Koreans" physically abused them with a broom when the workers protested.

Workers are similarly dismissed for demanding payment for their overtime hours. Mrs. Azucena Vail Lux, 28 years old, has three daughters and one son. She began to work at the maquila on December 7, 2002 and was dismissed on July 7, 2003 for having demanded payment of her overtime hours. Modas Galas Coreana, S.A., where she worked, forced her to work overtime hours until late into the night but refused to pay her in accordance with the law. The reaction of the company was to dismiss her, physically grabbing her and throwing her out of the factory under the direction of a supervisor known as Mrs. Choi. They still have not paid her wages nor any other benefits to which she was entitled.

Her complaint was presented to the Labor Inspectorate on July 9 and a conciliation hearing was set for August 6, nearly a month after her unjustified dismissal. In that hearing, the legal representative for the company failed to show up. The inspector therefore declared the process exhausted and indicated that she had 30 days to file a complaint against the employer before a

labor court. On August 25, she presented her complaint to the court, which set a hearing for October 15, now three months after her dismissal. At this hearing, the legal representative again did not attend, making it impossible to negotiate a conciliation arrangement. Despite the refusal of the employer to engage in the process, the worker has to exhaust each one of the stages of administrative and judicial processes, greatly extending the attainment of wages and damages.

## **V. ELIMINATION OF CHILD LABOR**

### **A. Background**

The effects of child labor last a lifetime, jeopardizing the future of working children by limiting their educational opportunities and, consequently, condemning them to a lifetime of low wages that are insufficient to cover their basic necessities. According to the 2002 census, Guatemala has 11,237,196 inhabitants, 2,434,192 of which are children between the ages of 7 and 14. Of those children, 255,260 are considered part of the economically active population, including 187,535 boys and 67,725 girls. In other words, one in ten children between 7 and 14 years of age participates in the workforce.

According to a 2003 study by MECOVI-INE, IPEC, the World Bank and UNICEF, 63% of child laborers work in the agricultural sector (76% of whom work without pay as assistants to their family), 16% in commerce, 11% in factories or workshops, 6% offering personal services (domestics) and 3% in construction. The average workweek is 47 hours, which is greater than what the law permits for adults in the public or private sector. However, children who do not also attend school work much longer, about 58 hours a week. Children receiving some form of education work closer to 40 hours a week.

Child labor in Guatemala takes many forms, including domestic service, manufacture of pyrotechnics, work in quarries, agriculture, mining, and the collection and sorting of garbage.

*Domestic Labor:* Many children in this sector work long days of at least 10 hours, 6 days a week. Many of these children are threatened, beaten and sexually abused, in addition to the fact that they are not paid their benefits nor are permitted vacations or sick days. ENCOVI has determined that there are 17,350 children between 7 and 14 who are child domestic laborers. Less than a third of child domestic laborers attend school. A report by the Office of Human Rights of the Archbishop places the figure much higher, at 93,000 children between the ages of 10 and 14.

*Pyrotechnics:* Manufacture of fireworks is one of the most dangerous jobs for children due to the highly explosive powder and the toxicity of the chemicals to which they are exposed. According to a 2002 study by the ILO, more than 7,000 people make fireworks in their homes, of which 3,700 are children. Of course, there are no safety measures observed nor protective equipment for these workers. The effects of this type of work are obvious, including injury to one's health, and in particular damage to the skin. On occasion, children have died by accidental explosions during work.

*Mines and Quarries:* Children are often employed in the moving, lifting and breaking of large rocks with heavy hammers to make stones for construction. Children often suffer broken or lost limbs or even death caused by rockslides. Additional risks include pulmonary damage, skin ailments and blindness. Children often engage in this activity after school for about 4-5 hours a day, 6 days a week, in conditions close to slavery.

#### *B. Examination of National Labor Laws*

As demonstrated above, it is very difficult to quantify the participation of children in the labor market, as it is illegal and therefore to some extent evades statistical measure. The basic components of national laws with regard to child labor are as follows:

Article 51 of the Constitution guarantees the protection of the rights of minors, including the rights to nutrition, health, education, and security, among others. In Articles 71, 72, 73 and 74, children are guaranteed the right and obligation to receive free initial, preprimary, primary and basic education from the state. Equally, in Article 75, literacy is declared as a social obligation and in Article 77, proprietors of industrial, agricultural, cattle and commercial companies are required to guarantee schools, day-care centers and cultural centers for their workers. In Article 102, employers are prohibited from employing minors of 14 years or less “in any job class, except in the exceptions established by the law. “

The Labor Code elaborates on these rights. In Article 32, the Code sets the minimum age for entry into the workforce, requiring that the hiring of minors of 14 years of age or less must be done with their legal representatives and, if not, then with the authorization of the General Labor Inspectorate. Article 147 further requires that the work performed by minors must be adapted to their age, conditions or physical state and intellectual and moral development. Article 148 prohibits work in unhealthy places, as well as night work, overtime and work in bars or other such establishments for all adolescents, and prohibits the work by persons younger than 14 in such places. Article 149 establishes the reduction of the work day for minors: a) by 1 hour daily and 6 hours weekly for those older than 14 and b) 2 hours daily and 12 hours weekly for the children age 14 or under or, whenever the work of these children is authorized according to Article 150, the General Inspectorate of Labor can extend, in qualified exceptions, written authorizations to reduce totally or partially the reductions of the work day.

In order to authorize a full work day for minors, one must prove that: 1) the minor is going to work in order learn a trade, or he or she has the economic necessity assist the family due to the extreme poverty of the parents or guardians; 2) the work is light both in duration and intensity, compatible with the physical, mental and moral health of the minor; 3) the work in some way fulfills the requirements of the child's obligatory education; and 4) the child is clearly advised of the minimum protections. With regard to night work, the government can suspend the prohibition for children that have turned 16 years old. As for children working in industry, the law establishes that children that have turned 16 but are younger than 18 will be able to work at

an interval fixed by the competent authority of 7 consecutive hours, between 10 at night and 7 in the morning.

### *Recent Reforms*

In 2003, Guatemala amended the Labor Code, promulgating the Law for the Protection of Childhood and Adolescence (Decree 27-2003), which was published in the official gazette on July 18, 2003 and which entered into force on July 23. This law provides, among other things, that the state is obligated to guarantee and provide children the full enjoyment of their rights and their liberties, including the protection of the physical, mental and moral health of childhood and adolescence. The law calls on the government to establish institutions to direct policies in favor of the interests of children and adolescents. For example, Article 51 establishes that “Children and adolescents have the right to be protected from economic exploitation, the performance of any type of work that may be considered dangerous to their mental or physical health or that impedes their access to education.”

The Ministry of Labor has also offered a reform package to the Labor Code that has been introduced and was read once by Congress. The proposal, which would reform Articles 32, 147, 149 and 150 of the Labor Code, would accomplish the following: set child labor at 14 years of age; prohibit child labor and its worst forms; assign joint responsibility to those obligated to prevent it (family, employers, representatives); guarantee the health, security, morality, instruction and professional development of children; establish that minors cannot work more than 6 hours daily nor more than 32 weekly; and in the case of a violation, provide that the employer must pay indemnification.

Specifically, the bill provides as follows:

To reform Article 32, defining what is understood as child labor to be labor performed by persons of fourteen years of age, and thereafter establishes the prohibition of child labor. In addition, joint responsibility is attributed to those who must ensure the respect of this prohibition and establishes an indemnification for working children in case of violation of the prohibition of child labor and the proposed prohibitions in articles 149 and 150, referring, respectively, to the days of work and dangerous work and worst forms of child labor.

Article 6 would reform Article 149 of the Labor Code by reducing of the ordinary work day for child laborers of fourteen years of age or greater (with the reference to such age, given the prohibition of the worker who is less than 14 years of age). It attributes the obligation to ensure the fulfillment of the limits on age and the work day, as well as the other applicable norms, to the employers, their representatives and to those who benefit direct or indirectly of the work of minors, with joint responsibility for the breach.

Article 7 proposes to reform Article 150 of the labor code with the prohibition of dangerous work and worst forms of work of child labor and defines such in harmony with ILO Convention 182, ratified by Guatemala. This is without detriment to the indemnification established in the

reforms to Article 32, and other responsibilities that will be derived from the breach of this prohibition.

One hopes that with these reforms there will no longer be working children in Guatemala. However, these reforms have yet to be approved by Congress and, most importantly, the employers must obey them. It is important to note that these reforms would not be necessary if employers obeyed the laws set forth in the present Labor Code.

### *C. Common Examples of Non-Compliance*

Despite legal protections and additional reforms solidifying the legal prohibition on certain forms of child labor, the problem of child labor is persistent. The Research Center and Support to Local Development (CEADEL) undertook a study in the Department of Chimaltenango among 12 agro-export companies, which represents 30% of the total number of such companies. Of them, 75% of the workers are adolescents between the ages of 14 and 17. The report tracked cases of child labor conditions in the non-traditional agro-export industries of fruit, vegetables and flowers in Chimaltenango. It is apparent not only that children are working without permission of the Labor Inspectorate, but also that the employers are not respecting the minimum rights established by law.

#### *Interviews with Child Laborers:*

*Overtime:* "Some do not want to work overtime hours but they force us to stay until 8:00 or 9:00 pm. We do not know how they are going to pay us for the overtime. They tell us Q2.50 and each day we work 3 to 4 hours extra and when we stay they don't give us refreshments or dinner. Some pay periods we receive Q 700 to 800 but usually we receive less."

*Social Coverage:* "They had a girl who was 8 months pregnant loading baskets of melon and broccoli. She has already had to stop working but they are not paying IGSS (social security)." (Testimony of a worker of IMPROCSA, located in the municipality of Tiling, Chimaltenango)

*Safety Equipment:* "I get headaches from fertilizers that are applied on the plants, they don't give us protection, the bosses don't give us permission to wash our hands, telling us that it is a waste of time, many of my fellow workers suffer stomach aches and when we request medicine they give us something that has already not worked or they say that there is nothing to give us." (Gidia Villafuente, worker at La Primavera, Municipality of Tiling, Chimaltenango).

*Other Violations:* "During work, we become hungry, cold, and our hands get wet with chlorine, which causes us to have allergies. Some do not want to work overtime but they force them to stay until 8:00 or 9:00 at night and without the right to leave to have supper." (Testimony of Mishel Grijalva, worker of IMPROCSA, Municipality of Tiling, Chimaltenango)

"When the supervisor finds somebody talking he gives them a written warning and will deduct Q100 from their wages." (Estela Carillo, worker of 17 years of age).



These cases demonstrate the violation of basic labor standards such as: 1) the prohibition against hiring children without the permission of the General Labor Inspectorate; 2) that children's work must be adapted to their age, physical condition and intellectual and moral development; 3) the prohibition of work by children younger than fourteen years of age; 4) failure to respect that the ordinary day of work set forth in the Labor Code should be reduced for children (one hour daily and six hours weekly for those fourteen and older; and two hours daily and twelve hours weekly for the children 14 or younger); and 5) failure to provide paid vacations, benefits and bonuses as required by law.

### ***In the Maquilas:***

Child labor in the maquila sector is also a problem. The following case is indicative of many such cases:

Due to the necessity to help with the family income, "Erika" started work on July 21, 2001, working as an inspector in a textile maquila, Suntex S.A. She worked Monday through Friday from 7:30 am to 7:00 pm and on Saturdays from 7:30 to 12:30 pm. She was paid a wage of Q 1,026 monthly. She initially got the job using the name of one of her older sisters, verifying that identity with her sister's birth certificate. Later, the company demanded that workers bring their cedula (certificate of residence), and the majority of the workers fulfilled this request. Those who could not were told to bring whichever certificate they could. Erika brought the cedula of her sister-in-law Ana Gabriela Coxaj Cabrera and with that name signed an individual labor contract and remained working until July 13, 2003 when she became ill. At the same time, the company closed down and fired most of its workers, without paying the workers what was owed to them.

### ***D. Common Obstacles to Compliance***

Guatemala's labor laws allows minors younger than fourteen years of age to work, although with rigid requirements for its authorization that in the end are not respected. However, the state, through its institutions, cannot and do not supervise, much less enforce, compliance with these laws. Moreover, without suitable economic policies, it is very difficult to eradicate child labor. Some business owners take advantage of children's economic needs, hiring minors on a temporary basis and without following the legal standards. In interviews conducted with the Labor Inspectorate and with union leaders, they explained that the obstacles to the enforcement of child labor laws are:

1. The child's fear to demand his or her rights.
2. Lack of confidence in the state institutions.
3. Length of the administration of justice.
4. Lack of specialized knowledge of judges in child labor matters.
5. Lack of knowledge or understanding of ILO Conventions and other international agreements with regard to child labor standards.

Moreover, the study undertaken by CEADEL concludes that the socioeconomic situation of the family, of the community and the few educational opportunities for the children, mainly indigenous children, force them to look for them work. Indeed, the social indicators for Guatemala are quite troubling.

As reported by IPEC in its report, "Qualitative Study about Child Labor in Guatemala" published in April 2003:

Diverse studies agree in affirming that poverty is the main cause that determines and explains the incidence of child and adolescent labor in Guatemala. . . Poverty brings, as a consequence of vulnerability and exclusion, the marginalization of great sectors of the population and prevents their access to rights and benefits. As demonstrated in the Report of the National Consulta, the participants thought that the low educational levels of the parents and mothers, unemployment and under-employment of adults, precarious health conditions and the limited access to services also affect the incidence of child labor. In addition to poverty, cultural values and traditions explain another dimension of this problematic. For some communities, farmers, mainly those of Mayan origin, child labor is considered as a cultural value that is part of the traditions and customs and that is transmitted from generation to generation as an essential element of the process of socialization of the child and his preparation for adult life.

The report of National Consulta also touched upon other causes that have a lesser impact but that contribute to that children and adolescents are forced to enter the labor market, including family problems related to the abandonment of either the father or the mother, alcoholism and intra-familial abuse, the lack of coherent social policies with regard to childhood, precarious health conditions and the absence of an equitable social development policy. Also, it is important to mention that some factors related to the education, like difficulty of access, the rigidity of the educational system, the insufficiency and the low quality in the services also is constituted in causes that explain the incidence of child labor.

## **VI. DISCRIMINATION IN EMPLOYMENT**

### **A. Background**

Until recently, women were not considered active members in the domestic economy and much less so for indigenous women. Indeed, indigenous women were considered incapable of doing most kinds of work. When such women found work, they were usually denied the rights given to men. This is in spite of Article 89, which explicitly provides that all persons shall enjoy equal pay for equal work. However, as numerous studies have demonstrated, discrimination against women and indigenous populations in employment is persistent. Human Rights Watch, in its report, *From the Home to the Factory: Sexual Discrimination in the Guatemalan Labor Force*, made several valuable observations on this issue.

- Guatemalan workers confront undignified labor conditions and discrimination in the apparel industry and in domestic service. Complaints are not filed by the victims for various reasons,

including workers' ignorance of their own rights and distrust in the administration of justice, as interviewed unionists and trial attorneys explained.

- Tens of thousands of women and children, the majority indigenous Mayans with little or no education, are employed as domestic servants or in the more than 250 maquilas, dedicated to the production of clothing for export. Although labor laws apply in the maquilas, factories that produce with imported inputs, free of tariffs and taxes, to re-export to other markets, it is rare that the laws are fulfilled.
- Labor legislation does not apply to domestic work. Domestic workers work 14 hours or more, and the Labor Code excludes them from the right to the minimum wage, the eight hour day, the 48 hour work week, and health services. Domestic employees rarely enjoy a complete day of rest a week, must struggle to obtain health care, and lack all maternity benefits afforded them under Guatemalan law.<sup>5</sup>
- Several Mayan workers interviewed stated that they suffered insults and psychological aggression, and that children of the employers were sometimes the most aggressive. Such cases are not brought to the authorities, since the workers either are ignorant of their rights or have an economic necessity to work.
- Mayan women and girls who work in the domestic sector are much more vulnerable owing to the persistent racist feeling that feeds the nonindigenous population, a country where 39.3% of the 11, 237,196 inhabitants are of Mayan origin. The country has not acted however to better prevent violations committed towards the indigenous women. It is difficult to eliminate discriminatory and racist sentiments with the promulgation of laws, because these attitudes are held over from the conquest and the only way to eliminate it is by means of campaigns promoting tolerance and respect.
- Maquilas usually deny maternity benefits to workers who become pregnant after being hired and systematically prevent access to the national system of health by not registering the employees or by prohibiting medical consultations during the workday. The maquilas offer essential employment for thousands of women, but the price to obtain work should never have to be workers' right to equality.

#### *B. National Laws*

Principles of non-discrimination in employment are set forth in the Labor Code. Article 14 of the Code prohibits discrimination based on race, religion, political beliefs and economic situation

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<sup>5</sup> To address the discrimination suffered by domestic workers, proposals to reform the labor code have been offered. Under Decree 1441, the proposed changes will help these workers to enjoy better conditions of work. For example, Article 164 of the labor code establishes that domestic work is not subject to limits on the days of work nor to the hours of the workday. The reform would provide complete equality between domestic workers and workers in general with regard to these rights.

with regard to entitlement to social assistance, education, culture, entertainment or business for the use and benefit of workers. Articles 151 (a) and (b) prohibit the advertisement of work which demands as a condition of employment being of a particular, sex, race, or marital status, unless it is a special, essential requirement for the work, in which case one has to request the permission of the General Labor Inspectorate and the National Office of Women. It is also illegal to make distinctions between married and single women and/or family responsibilities for the purpose of work. The Code also recognizes the concept of equal pay for equal work, requiring that work of a like position and with like seniority should receive equal pay. However, the Labor Code permits discrimination in favor of its nationals. The employer is permitted to hire, in equal circumstances, Guatemalans over foreign workers.

There have been a series of amendments affecting the principle of discrimination in employment. The Penal Code was amended to define discrimination as "all distinctions, exclusions, restrictions or preferences by race, ethnic group, language, age, religion, economic situation, disease or marital status" that limit the exercise of the rights of any person. This law contemplates all acts of discrimination, giving workers the right to file complaints against any discriminatory treatment, including discrimination in employment.

Additionally, in 1999 Guatemala passed the Law of Dignification and Promotion of Women by Decree 7-99. The law recognizes the pluricultural and multilingual character of Guatemala and the constitutional principles with respect to freedom, dignity, human life, and equality before the law. The stated objectives of the law are to promote the complete development of women and their participation in all levels of the economic, political and social life of Guatemala and to promote the development of the fundamental rights in relation to the promotion of women. The law also establishes certain principles with regard to discrimination.

*Discrimination Against Women:* Discrimination is understood as any distinction, exclusion or restriction based on sex, ethnic group, age and religion, among others, that has the object or result of reducing or nullifying the recognition, enjoyment or exercise of their social and individual rights enshrined in the constitution.

*Violence against Women:* Violence against women is any act or omission that creates physical, moral or psychological injury.

*Minimum Guarantees of Work:* conditions of equality in work and effective mechanisms and inspections to guarantee total employment and to make effective the right of women to enjoy:

- The freedom to choose their employment.
- Fair work schedules, equality of benefits, especially those regarding pension benefits for relatives of deceased, fair remuneration, treatment and evaluation of work.
- Social security benefits, especially for those who are retired, ill, incapacitated, nursing or pregnant, elderly, or otherwise unable to work.
- Inclusion in the labor force regardless of disabilities or advanced age.

- The generation of sources of employment for women in general, emphasizing access to non-traditional employment to increase their income.
- The fulfillment of the prohibition of dismissal for reason for pregnancy or maternity.
- Non-discrimination on the basis of marital status or being the head of the home.
- Access to basic services, conditions of occupational health and safety at work.

*Application of the Law.* The law has general application involving all facets of social, economic, political and cultural interaction. The law also provides that the perpetrators of violence or discrimination against women may be individuals or corporations.

### *C. Common Violations of the Law*

Discrimination in employment is an endemic problem. Many of the women who work in the maquilas in Guatemala have had to take pregnancy tests to prove that they were not pregnant. This facially violates the Constitution and the Labor Code, which prohibit a) advertising offers of work specifying that the applicant be of a particular sex, race, ethnic group or marital status; b) distinguishing between unmarried and married women and/or women with familial responsibilities and c) dismissing pregnant or lactating workers. Indeed, advertisements in the employment section of newspapers in Guatemala often require that a person be between 18 and 25 years of age, which of course discriminates against older persons.

Women also undergo constant sexual harassment and, if they do not accede to these demands, are fired. This occurs most frequently in maquilas and in domestic employment. Additionally, it has been reported that when an indigenous person and a ladino apply for work with an employer, including work in transnational companies, the employer will usually hire the ladino over the indigenous person.

### *A Case Study in the Maquilas*

Maria Magdalena Mendoza, 54 years old, worked at STAR FASHION, S.A. with a work schedule from 7 a.m. to 7 p.m. She started working at the factory on August 26, 1996 and was dismissed on March 8, 2001. Prior to her dismissal, she faced a series of problems with the company because, due to illness, she needed to leave work for medical care. The company refused to give her a work certificate so that she could take advantage of her right to health coverage. She therefore had to go to a different doctor. They refused to give her permission to attend her appointment. She then decided to miss a day of work, meaning a deduction in her wages. In retaliation, the company unjustly suspended her from work, which is a constant practice in that factory. They also withheld money from her annual bonus (Bono 14), which is paid in July.

Other conditions Maria and others had to endure were tactics such setting the two clocks that record the time of arrival and departure at different times so that the one at the entrance was set forward and the one in the production plant displayed the normal time. She also indicated that

she had problems getting permission to use the bathroom and could not drink water for several hours. She eventually reported these violations to the Labor Inspectorate.

Maria told us, however, that she did not have confidence in the inspectors because on other occasions they had arrived at the factory and went straight to the administrative offices, talking to the employer, and leaving without doing anything. The company pressured her not to report anything, telling her that they were going to report her to the Penal Court because she was Salvadoran and carrying a falsified certificate of residence.

Following Maria's complaint, an inspector came to the factory on February 14 to assess the situation. After hearing arguments, the parties reached an agreement allowing her to continue to work at the company and to pay her for the days when she was suspended. The labor inspector recorded the agreement and warned the company not to take any form of retaliation against her and to make the promised payments. The inspector set a term of eight days to fulfill the agreement. On March 8, the inspector returned to the factory to verify the fulfillment of the agreement. However, as the company had not paid her, he declared the conciliation process exhausted so that she could enforce her rights before the labor courts. Two hours after the inspector's visit, she was dismissed verbally by Miss Mavi Vasquez Coronado, supervisor of the company. She reported her dismissal on March 11, 2002.

On April 1, 2002, the first hearing was held at the General Labor Inspectorate, where Mara Lisbeth Garcia Rosales, Director of Personnel, appeared on behalf of the company. She denied that Maria was fired, saying that the person who supposedly fired her was not authorized to do so and that all dismissals had to be made in writing on the express order of management. She argued that Maria abandoned her job without notice and that despite the abandonment of her work they offered to pay her Q1,402.00 for her 5 ½ years of service at the company. Maria did not accept the settlement amount because the amount owed to her, according to the calculation by the labor inspector, was Q7,144.00. This ended the hearing and gave her 30 days to file a case with the labor tribunal.

On May 2, 2002, she presented her complaint to the labor court and on May 6, the second labor judge handed down a resolution accepting the case and setting the first hearing for June 17, 2002. Only Maria attended the first hearing, despite the fact that the company had been properly summoned. On October 8, 2002, the parties were notified of a sentence handed down by the labor judge on June 19 (almost four months afterwards) in which he decided the case in Maria's favor. On November 20, the parties were notified of the October 31 resolution in which the judge ordered payment and additionally ordered that if the company failed to pay, he would seize the company's goods in an amount sufficient to cover the wages and damages owed. Maria confronted a series of difficulties in executing the order and a year later the parties reached an out of court settlement of Q5,000.

## *Review*

This case is representative of working conditions in the maquilas. The dismissal violated the Labor Code because it was a form of retaliation against the worker for exercising her rights. Here, the worker was dismissed despite of having an order from the inspector preventing the employer from taking any form of retaliation.

The first problem confronted in filing these complaints is the lack of attention on the part of the General Labor Inspectorate, whose representatives fail to take note of all of the violations reported by the worker. When calculating benefits, they do not do it as a function of the actual lost wages, but frequently include other amounts not stipulated in the law. This of course affects the negotiation between the employers and the workers.

In the conciliation hearings, the labor inspectors don't often comply with their duty to ensure the strict compliance with the laws. In many cases, instead of assumeing an active role to make proposals to the parties to the conflict, they merely hope that the employer and the worker can reach an agreement; otherwise, they exhaust the process and let the worker take the issue to the labor courts. In other cases the same inspectors are pressuring the workers to accept the employers' proposals.

This particularly affects the worker, who is obligated in many cases to accept unjust settlements and is not supported by the inspector that represents the labor authority.

## *Labor courts:*

At the moment of carrying out the sentences and collecting the payment of the labor benefits, the defendant often refuses to pay, making it necessary to seize some of the company's property. The problem is that those who are responsible for enforcing the order to pay are not allowed to enter the companies, but rather are met at the gates where the security guards are. This makes it difficult for them to take a look at the company's property that can be seized. In most cases, the defendants do not have property registered in their name, and this makes it impossible to carry out the sentences.

## *Business owners:*

In many cases, the business owners do not attend the hearings called by the General Labor Inspectorate or the labor courts, which delays the process even further. They try to avoid having to negotiate an agreement, using the delay to make the workers lose hope so that after a long time they will finally accept the amounts that the business owners offer them.

Following the reform to the Labor Code that allows the General Labor Inspectorate to fine companies that do not attend conciliatory hearings, and with increases in the amount of these fines, business owners started to attend more frequently. However, they attend in order to avoid the fines, and almost always argue that there was no dismissal and that the worker abandoned his

or her job. In other cases, they offer payments that don't even equal 25% of the total amount demanded.

Sometimes employers sign payment agreements with the workers, but these are for partial monthly payments. However, they only make a few of the payments and then refuse to fulfill their obligation. This makes it necessary to initiate a trial before the labor courts. In other cases, companies drag out the payment process and later disappear by changing name or address, which affects not only the worker that is owed money, but also all of the other factory workers.

In the trials, when they do show up at the hearings, employers don't turn over the payroll records requested as evidence. They do this in order to avoid showing the salaries they pay for normal working hours and overtime, and also to avoid showing the total number of workers at the company. This could cause problems with Social Security because the payroll papers sent to Social Security do not report all of the workers or their salaries. It is cheaper for them to pay a fine for not showing the books than to have to pay the Social Security Institute all of the premiums that they have failed to pay for many years.

Property and bank accounts are usually not registered in the name of the defendants but rather in the name of individuals, who frequently are trusted workers, heads of personnel, or supervisors. This lets the companies avoid the seizures ordered by the labor courts.

## **VII. DECENT CONDITIONS OF WORK – THE MAQUILA SECTOR**

### *A. Background*

Many reports have addressed the difficult conditions in which women work in the majority of factories in the maquila sector. In addition to the long days, they confront humiliating conditions. A review of the complaints filed by women in the maquila sector gives us a picture of the kind and number of violations reported. The first chart shows the complaints received by the Labor Inspectorate between January and October 2003:

<b>TYPE OF CASE</b>	<b>QUANTITY</b>
Suspension of Work without Pay	182
Failure to Provide Social Security Certificate	134
Dismissed in State of Illness	80
Abuse	65
Illegal withholding of Wages	43
Changes in Conditions of Work	27



Forced Overtime	22
Dismissal during Period of Lactation	16
Failure to authorize time for breastfeeding	15
Denial of payment of overtime hours	13
Illegal suspension for attending Social Security	11
Deny workers entrance to their place of work	8
Discount wages for Social Security	7
The company does register workers with social security	6
Pressure to resign during lactation period	4
Pressure to resign during pregnancy	4
Anti-Union Retaliation	4

**Source: Office of Working Women. Ministry of Labor**

The next chart identifies the number and types of cases received by the CALDH Legal Clinic, one of the few places where maquila workers can receive legal representation. Figures are 2002 to October 2003.

Type of cases	2002	2003	TOTAL
Dismissals	62	56	118
Indirect dismissals	5	14	19
Resignations	21	28	49
Denial of Employment Certificate for Social Security I. G. S. S.	9	1	10
Suspension of work	10	9	19

Abuse	15	7	22
Legal Consultation	14		14
Annual Total	136	115	251

A complete report on the conditions of work present in the maquilas of Guatemala is attached hereto. For purposes of the report, we highlight the basic laws and common violations found in the maquilas related to decent conditions of work.

## *B. Selected National Laws*

### *1. Maternity Protection (Article 151(c))*

#### *Immunity from Dismissal*

Immunity from dismissal is a right of pregnant women and consists in the right not to be fired during the entire term of pregnancy (9 months and the pre and post-natal period of 84 days) and the period of lactation (10 months). In sum, the right of non-dismissability of a woman for maternity lasts 21 months. This right protects the worker when the employer gives no reason for dismissal. If the woman does not fulfill her work obligations and if the employer provides adequate proof before a labor judge, he can request permission to dismiss her even if she is pregnant.

The worker must give notice of her pregnancy to the employer, temporarily protecting her from this moment and giving her 2 months to provide a medical certificate affirming her pregnancy, at which time she is protected completely. It is recommended that the notice be in writing with a copy given to the employer for his signature acknowledging receipt and a copy for their own records.

An employer is prohibited from forcing pregnant women to perform heavy work that would risk their pregnancy during the 3 months before giving birth.

#### *Right to Reinstatement*

If the employer fires a pregnant woman during her period of lactation without having permission to do so, the worker can petition the labor tribunals for reinstatement to the job from which she was dismissed as well as the right to payment for the time she was without work.

### *2. Pre and Post Natal Rights (Article 152)*

Mothers will enjoy a paid rest with 100% of their salary during the 30 days before the birth and the 54 days that follow. If they cannot use the 30 days before birth, they can combine those days with the post-natal days and thereby enjoy 84 days of rest during this period.

She may only leave her work upon presenting a medical certificate that states that she will give birth within 5 weeks from the date of the issuance of the certificate or counting backwards from the approximate date of the birth. All doctors that work with the government or state institutions are obligated to issue this certificate for free.

Workers who adopt children have the right to post partum leave so that they can enjoy a period of acquaintance. In such cases, the leave begins the day following the day the child has been adopted. In order to enjoy this right, the worker must present the documents proving the adoption process.

### 3. *Right to a Period of Lactation (Article 153)*

All workers in a period of lactation may, twice a day for half an hour, feed their children in the workplace. Lactating mothers can accumulate the two half hours and arrive an hour late for work or leave an hour early with the object of nursing their children. This hour must be paid, and noncompliance will give rise to a sanction to the employer. This period is counted from the day that the mother returns to work until ten months later, can be extended by a doctor.

### 4. *Child Care (Article 155)*

All employers with more than 30 workers are obligated to provide a nursery for the purpose of allowing mothers to feed their children who are three years old and younger without risk and to leave their children during the work day under the care of a person designated and paid by the employer.

### C. *Examples of Common Violations*

In general, maquilas have opted to hire a female workforce to perform manual labor. Often, this work does not require prior training and thus they are immediately available to work. Moreover, some employers consider women the most able to perform this work because of the perception that they are less troublesome and have greater difficulty exercising their rights. Given the lack of organizational experience and the violence, discrimination and underappreciation they suffer in society, employers assume that it is easier to pay them wages lower than those established under national legislation.

### *Wages*

Workers in the maquilas receive a monthly wage that equals Q1,026.00, adding Q250 for an incentive bonus, for a total of Q1,276.00 a month. Beyond this, there are overtime hours and bonuses for reaching production goals. However, these bonuses are calculated on what the fastest

worker produces and not on the basis of an average in accordance with the rhythm of production, as it should be. Thus, all women are obliged to reach this goal in order to be able to obtain a little more than the bimonthly salary.

The companies also utilize strategies to avoid other responsibilities. For example, they maintain three distinct classes of payroll records, one to show to the labor inspectors when they make visits, another that is provided to the Social Security Administration (IGSS), and another, the real one, for internal usage. This has several consequences. Workers' access to health services is limited because the employer denies them a work certificate to make an appointment with IGSS because the workers are not properly registered.

### *Health Conditions*

There are many problems that factory workers face with regard to health and safety. The lack of potable drinking water is a source of infectious diseases and gastritis. Similarly, the restrictions on bathroom use, in the best case to two times a day, doesn't comport with the necessities of the workers and becomes critical during menstruation. The lack of ventilation, poor ergonomics, and the lint that is shed from the fabric are also sources of occupational illness. Additionally, there are not adequate places to prepare meals. Certain companies prohibit workers from bringing food, thus obliging them to buy food from company owned kitchens.

### *Labor Relations of the Production Line*

In the factories, there is a hierarchy from the owners, to the personnel managers, to the line supervisors who are charged with keeping watch on production. The factory owners, when they are present, put enormous pressure on the managers, who then in turn do the same to the line supervisors, who ultimately pressure the workers, often with physical or psychological abuse.

The following data was collected by the CALDH legal clinic, which is one of the few places that offer legal advice to maquila workers in Guatemala.

### *Verbal and Direct Dismissal*

One common example: A worker misses three days due to illness, notifies the employer by phone the first day and appears for a consultation with a particular doctor but they refuse their work certificate to go to Social Security. When they show up for work on the third day, the employer dismisses them, accusing them of abandoning their job.

The majority of the dismissals are not for cause. In such cases, the law requires the employer to pay workers indemnification, their Christmas bonus, vacations, annual bonus and incentive bonuses. It is important to note that many cases categorized as direct dismissal had their origin in other types of problems, such as abuse, illnesses, and the company's refusal to give the worker a certificate to take to IGSS for treatment. Workers do, in general, request help in moments of major conflict; however, there are very few of them that file complaints while employed. This is

fundamentally motivated by ignorance of the Labor Code, fear of losing a source of income, and the lack of economic resources.

### *Resignation*

Another strategy used to remove workers is to threaten them with a disciplinary complaint before the Labor Inspectorate so that they lose the right to indemnification in the case of dismissal. Often, this causes them to resign without filing the corresponding complaint to the Labor Inspectorate. Other cases of resignation are accomplished by forcing the worker to sign blank page that is in fact a resignation letter, taking advantage of the fact that many workers are illiterate.

### *Dismissals during Pregnancy or Lactation*

The majority of cases occur because the women do not know of their legal right to immunity from dismissal. The employers for their part, as soon as they suspect that a woman is pregnant, dismiss her without regard for the fact that she has a right to 9 months of pregnancy leave, pre and post natal rest, as well as 10 months of lactation. In the case that any pregnant or lactating worker commits any one of the causes for dismissal established by law for cause, the employer must ask the judge for authorization to fire her.

### *Abuse of Workers*

“In that moment they had surrounded the woman. They didn’t allow the woman to drink water, they didn’t allow her to go to the bathroom, nor to have lunch, they punished her. And they had her seized for supposedly being late, though she had not arrived late. They had made her late. When she rang the bell in order to enter the factory, they came to the door and then closed it on her. They had made her late but she had not arrived late.”

In the maquilas there is a belief that you have to hit workers, or yell at them, or humiliate them so that they will produce more. There is additionally a culture of violence and oppression in which men and women of Guatemala have lived for more than 500 years. They tend to only complain about those acts that affect their physical wellbeing. The case of women is particularly complicated, because they also suffer violence in other social spaces, including the home.

### *Denying Employment Certificate to Attend IGSS*

Employers generally deny women their certificate of employment to allow them to go to Social Security, which is due to the fact that many employers have not signed their workers up for these services. The denial of these certificates have grave consequences, as women are forced to pay a private doctor in spite of the fact that they pay for the social service.

### *Reductions in Salary for Going to Social Security*

Once a woman obtains a certificate and shows up at social security, the employer often discounts her salary for the day as if she had been gone without cause.

### *Forced Overtime*

The Constitution and the Labor Code establish that ordinary and overtime hours of work cannot exceed 12 hours a day, except with limited exceptions determined with regard to the appropriate regulations or that accident or imminent risk which endangers the workers, the establishment, machines, installations, products or harvest and without evident harm, it is not possible to substitute workers or suspend the work of those who are working. In many case, workers in the maquilas are working more than 12 hours, approaching 16 – 18 hours or more. In some cases, they work the whole night and are permitted to return to their house for 2 or 3 hours after which they have to begin work anew.

### *Sexual Assault*

Guatemala does not have legislation on sexual assault, making it difficult to pursue legal action against the person committing such acts. Women's organizations have been discussing concrete proposals to make the act of sexual assault illegal, both in the Labor Code and Penal Code.

It is certain that sexual assault is a frequent violation of the rights of women workers in the maquilas. However, the cases that are filed are very few and are usually brought by women who do not work in maquilas. Complaints are not filed for many obvious reasons, chief among them the fear of losing employment, which in most cases is their only source of income. The embarrassment and social stigma is also a concern, as the blame for such violations is often put upon the woman and not on the aggressor. Finally, women have expressed a lack of confidence in the authorities charged with applying the law.

### *Collective Cases for Closure of Businesses*

Cases of mass dismissal by plant closure happen, in general, at the end of the year. By so doing, employers avoid paying the year end bonuses and other benefits established by law. In the case of plant closures, companies often change their names and addresses with the goal of trying to maintain tax exemptions. Companies that do so force the workers to sign new contracts to initiate a new labor relationship without paying their wages and benefits owed them.

## **VIII. CONCLUSIONS**

### *A. Freedom of association and the right to organize and bargain collectively*

In Guatemala, the laws guarantee the rights of free association and collective bargaining. In practice, they are not respected, owing to the situation of violence and insecurity that exists in the country, especially against union leaders who are intimidated, persecuted, threatened and dismissed to avoid the demands for social and economic rights.

A culture of dialogue and negotiation does not exist between the different actors of production (employers, employees and government authorities), which makes it difficult to create spaces to resolve collective conflicts. The mechanisms and institutions created to facilitate collective negotiation have many limitations and obstacles to the fulfillment of the role to which they are given.

The low percentage of workers organized in unions in relation to the economically active population (EAP), affects their ability to negotiate economic improvements, in addition to a history of persecution and antiunion practices in the country. In the maquilas, the minimum conditions to exercise labor rights do not exist, much less the exercise of freedom of association and collective negotiation. This is due partly to the mobile character of this sector and the inability of the labor authorities to exert real control over the breach of labor rights that occur in this sector.

#### *B. Child labor*

In Guatemala, the persons most prone to exploitation are children. Employers often take advantage of their economic needs and submit them to grueling and illegal working conditions. National laws, much less the ILO agreements ratified by Guatemala, are infrequently observed. As such, children become the perfect target for labor exploitation, because most of them are unaware of their labor rights. If they know their rights, they do not dare try to enforce them because this would mean the rejection of work that is helping them to contribute to the economic sustenance of the family.

The work of children is not given importance, and in this, the state authorities play a decisive role because they do not demand that companies verify whether there are children working in their factories and whether they have fulfilled the requirements contemplated by the national and international laws. The ignorance of the national laws and the little importance given them, by both employers and state authorities, do not contribute to the development of children in Guatemala. The scant attention paid to the issue by union leaders is also a problem.

#### *C. Employment Discrimination*

The Constitution and the Labor Code do not clearly establish laws concerning employment discrimination. Only the Penal Code contemplates a sanction for people who in general commit act of discrimination (not specifically in the area of labor). The workers who suffer any type of discrimination at work do not complain for the simple fact that they do not understand that when they are told that they won't be hired for belonging to a certain group or when they are fired for being pregnant, that they are in fact victims of employment discrimination. The climate of impunity is not solved with reforms to eliminate discrimination in employment, but rather must be addressed through education concerning these rights and by developing the institutions of justice that could support such demands.

## **IX. POST SCRIPT: THE GSP PROCESS**

Beginning in 1988, the ILRF, along with a new NGO called the Guatemala Labor Education Project (GLEP), and allied U.S. union, church, and human rights groups, filed petitions each year to the USTR calling for an end to GSP benefits for Guatemala unless the government halted labor rights violations. Separately, in its annual comprehensive filing covering many countries, the AFL-CIO also petitioned for Guatemala's GSP cutoff.

Before each petition was filed, the ILRF-GLEP coalition sent a delegation to Guatemala to meet with workers, union leaders, church activists, U.S. embassy staff, and Guatemalan government officials. The delegations also met each year with agricultural and maquila enterprise owners, and with officials of the Guatemalan counterpart to the U.S. Chamber of Commerce. In a parallel fashion, Guatemalan unionists sent delegations to the United States to tour the country meeting with labor, church, human rights, and community organizations, and in Washington with U.S. government officials to discuss labor rights and labor conditions in Guatemala.

Petitioners detailed assassinations, arrests, and torture of trade union activists, repressive provisions of the Guatemalan Labor Code, and non-enforcement of worker protection laws in the first four GSP petitions filed by U.S. labor rights advocates from 1988 to 1991. However, during this initial period, the USTR denied review of every petition.

USTR made two main arguments in refusing to accept the 1988-1991 petitions for review. First, evidence of trade unionists victimized by threats, beatings, and assassinations made a possible case for human rights violations, but not for labor rights violations because it was not clear that they suffered such reprisals because of their trade union work. Second, the mere introduction of labor reform legislation, before any parliamentary approval of such reforms, indicated that the government was "taking steps" to afford worker rights.

Despite the initial failure to achieve acceptance for review, the filing of petitions and their possible acceptance created a dynamic that modestly changed labor conditions in Guatemala. Behind the official rejection of the petitions, U.S. officials pressed the government of Guatemala for progress on labor rights to justify their rejection.

The annual cycle of delegations and petitions put increasing pressure on Guatemalan government and employer interests to avoid scrutiny under the GSP labor rights clause and risk losing beneficiary status. Each year, one or more collective bargaining disputes or failures to grant legal status to a newly organized union, cited by petitioners as evidence of worker rights violations in Guatemala, were resolved in workers' favor just as consideration of the labor rights petition was getting underway. Although viewed by labor rights petitioners as evasive action that failed to address the overall pattern of worker rights violations, such moves allowed the government of Guatemala to claim it was "taking steps" to afford labor rights.

The exchange of petitions and rejections in 1988-1991 also put pressure on the U.S. government. The U.S. Trade Policy Staff Committee (TPSC) found itself having to devise increasingly



contorted arguments to justify a refusal to accept Guatemala GSP petitions for review. However, a breakthrough came in 1992. After a new labor rights petition was submitted in June 1992, the ILRF, GLEP, and allied union, church, and human rights groups organized letter-writing campaigns from their grass roots members to members of Congress and to the USTR urging acceptance of the Guatemala petition and calling for public hearings. More than 100 members of Congress wrote to the USTR demanding acceptance and review.

In August 1992, the TPSC finally accepted a Guatemala labor rights petition for review. In October, it held a public hearing on conditions for workers and unions in Guatemala. If the TPSC found Guatemala in violation of the labor rights' conditionality clause in GSP, a decision to apply sanctions could be announced in April 1993, to take effect in July 1993.

Like earlier petitions, the 1992 Guatemala complaint pointed to repeated attacks and threats against trade unionists, labor code provisions that violated ILO Conventions, illegal crushing of efforts by workers to form unions, failure to enforce minimum wage and hour laws, extensive child labor, and abusive health and safety hazards. A focus of the petition was conditions in the rapidly growing maquila sector, especially in the large number of garment assembly plants owned by Korean investors.

The U.S. government's acceptance of the 1992 petition caused consternation in Guatemala. Government, business, and the media joined ranks to denounce U.S. interference in the sovereign affairs of Guatemala. More ominously, new death threats were made against Guatemalan union leaders who hosted U.S. labor rights delegations and who came to Washington to testify at the GSP hearing. Still, Guatemala was anxious to avoid sanctions. The government and employers moved quickly to settle a number of long-standing labor disputes and to amend the Labor Code with provisions long sought by trade unions. Union organizing was simplified under the reforms and enforcement measures were strengthened.

After acceptance for review and the public hearings that followed, there were three possible outcomes to the administrative process under the GSP labor rights clause. Guatemala could be found to be "taking steps" to afford internationally recognized worker rights and thus remain eligible for GSP benefits. It could be found not to be taking steps and suffer the sanction of removal from GSP beneficiary status. Or Guatemala could be placed on what USTR calls "continuing review" status, where it would remain in the GSP program with careful monitoring of steps to improve labor rights and working conditions. Without such improvements, sanctions might swiftly be applied.

Initially, petitioners objected to the "continuing review" option, arguing it was not contemplated or permitted under the statute. But practical considerations breached this principled position. For one thing, there was progress in several prominent labor disputes. Unions whose applications for "legal personality" (a status needed to buy property, employ staff, and make contracts) had been delayed for months, suddenly found themselves certified and able to function. Some stubborn collective bargaining conflicts were settled with gains for workers. Just as important, death threats against Guatemalan union activists had to be taken seriously.

Demanding immediate imposition of a cutoff of GSP benefits against Guatemala might endanger the lives of trade unionists who worked closely with U.S. petitioners. With these realities in mind, the petitioners and the Guatemalan unionists in March 1993, agreed to drop demands for sanctions and instead called for a "continuing review."

A dramatic turn of events in Guatemala soon afterwards made the GSP labor rights petition a pivotal issue for the future of constitutional order in Guatemala. On May 25, 1993, President Jorge Serrano dissolved the Guatemalan parliament and Supreme Court, and suspended constitutional rights. He warned against "destabilizing" protest activity by trade unionists and grassroots organizations. Union leaders and other activists in farm worker and community organizations went underground, fearing a revival of mass arrests, killings, and disappearances. As one analyst put it: "Union leaders are cautious. They want to gauge how much international sympathy (and thus some measure of protection) there is for direct action against Serrano. 'We're not all meeting together, and we're staying in different locations,' says Dino Arana of the Union of Guatemalan Workers."

The impending decision on Guatemala's GSP status proved to be a critically important policy tool for the United States in pressing for the restoration of constitutional governance. At news of the autogolpe (self-coup), the U.S. labor rights coalition met with USTR and State Department officials demanding an immediate cutoff of Guatemala's GSP benefits unless constitutional rule was restored. The State Department issued a statement that "unless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn."

U.S. press analysis pointed out the leverage in the GSP decision: "But perhaps more damaging to the local economy and Mr. Serrano's cause could be the call by U.S. labor rights groups to revoke Guatemalan industry's tariff-free access to the U.S. market for certain products . . . Guatemala's labor practices are already under review by the U.S. Trade Representative's office . . . Given Serrano's suspension of the right of public protest and strikes, analysts expect U.S. Trade Representative Mickey Kantor to consider terminating Guatemala's trade benefits."

The New York Times also cited the impending labor rights decision as critical to Serrano's fate. It reported on the day before his abdication that "businessmen have panicked at a threat by the United States to withdraw Guatemala's trade benefits under the Generalized System of Preferences." Serrano's autogolpe collapsed. On June 5, the reconvened Guatemalan Congress elected Ramiro Deleon Carpio, who had been the independent human rights special counsel and a leading human rights advocate in Guatemala, as the new president of the country. The following day, after Serrano's flight into exile, a New York Times analysis concluded:

Why Mr. Serrano launched his palace coup in the first place . . . was never entirely clear. But the reasons for his downfall were clearer. Most important, it seems, was the concern of business leaders that Guatemala's rising exports to the United States and Europe could be devastated if threatened sanctions were imposed. Within hours of an American threat to cut Guatemala's trade benefits, business leaders who in the past had supported authoritarian rule began pressing government

and military officials to reverse Mr. Serrano's action.

On June 25, U.S. Trade Representative Mickey Kantor announced that Guatemala would remain a GSP beneficiary country for an extended "continuing review" period. "If countries fail to make substantial concrete progress in addressing worker rights concerns during this time," he warned, "their GSP benefits will be in serious jeopardy."

For several years after the 1993 constitutional crisis, Guatemala remained on "continuing review" status for GSP eligibility. The GSP labor rights case was not as prominent as United Nations-sponsored negotiations for a political settlement to end the civil war, but it still got results in specific cases as labor rights advocates prodded for change. With these gains in place and with progress in implementing the United Nations-brokered peace accord, U.S. labor rights advocates in 1997 quietly approved the U.S. government's decision to halt the continuing review of Guatemala's GSP status and to maintain its full normal GSP benefits.

Lobbying by the AFL-CIO and by the US/Labor Education in the Americas Project (US/LEAP, formerly GLEP), and other labor rights advocates, persuaded the Clinton administration's USTR to reopen a GSP labor rights review of Guatemala's beneficiary status in 2000. Fragile labor courts and enforcement institutions had failed to anchor reforms and employers who still saw trade unions as subversive bodies launched new attacks on workers. Armed bands assaulted leaders of a banana plantation workers' union, SITRABI, at a DelMonte company subsidiary, BANDEGUA, in late 1999, and over 900 union members were fired. Evidence continued to pour out of maquila factories of harsh conditions, sexual harassment, short pay, excessive hours, child labor, and other labor rights abuses.

In May 2001, the Bush administration closed the review and kept Guatemala in the GSP program. The decision was a disappointment for Guatemalan unionists and their supporters in the United States because the pressure of the GSP process seemed to be an important means of achieving results for workers. Bush's USTR pointed to the reinstatement of banana plantation workers and the first of its kind prosecution and conviction of the assailants who had beaten their union leaders. The USTR also cited a labor reform bill approved by the Guatemala Congress in 2001 that granted new rights to farm workers and stronger penalties against violators. All this, said the USTR, was evidence that Guatemala was "taking steps" in compliance with GSP labor requirements.

On September 3, 2003, the USTR once again accepted for review GSP petitions filed by both the AFL-CIO and the International Labor Rights Fund with regard to labor rights violations in Guatemala. The petitions cited the judicial impunity with regard to the murders of and death threats toward Guatemalan trade unionists. Additionally, the systemic failure of the government to adequately enforce the existing laws, and the inadequate remedies available to workers unlawfully dismissed also motivated the AFL-CIO and ILRF to file petitions in conjunction with their Guatemalan counterparts. Indeed, the number of murders and the lack of any apparent investigation of them was a major factor in the decision to accept review.

A public hearing was held at the USTR on October 7, 2003, for the parties to make their case with regard to the claims set forth in the petitions. The Guatemalan Ambassador, Antonio Arenales Forno, noted that Guatemala had amended the Labor Code in 2001 and that new amendments were before Congress. Moreover, the Ambassador assured the panel assembled at USTR that Guatemala was taking all measures within its reach to address the situations set forth in the petitions. However, Congress did not pass the cited amendments to the Code before the 2003 elections. Meanwhile, violations of labor rights, both large and small, as detailed in this report, continue. A decision from USTR is expected later this year.

**IX. PROPOSED REFORMS TO LABOR CODE PRESENTED BY THE MINISTRY OF LABOR**

CURRENT LABOR CODE	PROPOSED REFORMS TO LABOR CODE
<p><b>Article 32.</b></p> <p>Work contracts regarding the labor of children under age 14 must be established with these children's legal representatives, or, failing that, with the authorization of the General Labor Inspectorate.</p> <p>The product of the labor performed by underage children, referred to in the previous paragraph, should be received by their legal representatives or by the person who is in charge of caring for the children, according to what the General Labor Inspectorate determines in its authorization.</p>	<p><b>Article 32</b></p> <p>Child labor is work done by children under age 14. All forms of child labor are prohibited.</p> <p>Parents, guardians, adult relatives, employers and their representatives, and those who by their job or public position or company position have the obligation to monitor labor norms that protect minors, are directly, individually and collectively responsible for compliance with these norms.</p> <p>In the case of violations of the prohibition contained in this Article and in Articles 149 and 150 of this Code, without detriment to the civil, penal, administrative or other responsibilities they incur, the offending employers should pay the child worker an indemnification that will be determined by the General Labor Inspectorate. This payment must be made within 15 days of the Inspectorate's resolution. The certification of this resolution constitutes executive title.</p> <p>The child worker maintains the right to receive the salary and other labor benefits that correspond to him/her for the work done.</p>

<p><b>Article 61</b></p> <p>In addition to that contained in the other Articles of this Code, and in the social security laws, employers have the following obligations:</p> <p>a) To send within the first two months of each year to the administration of the Ministry of Labor and Social Security, directly or by way of the labor authorities from the place the respective companies are located, a report that contains at a minimum the following information:</p> <ol style="list-style-type: none"> <li>1) Total expenditures including salaries, bonuses, and other economic benefits from the previous year, noting the difference between the pay for normal working hours and the pay for overtime.</li> <li>2) Names and surnames of the workers with their approximate ages, genders, nationalities, occupations, number of days worked and the salary received during that year.</li> </ol> <p>The labor authorities should facilitate compliance with this requirement in whatever way possible: by printing the appropriate forms, helping small business owners or those who lack instruction in filling out the forms correctly, etc.</p> <p>The norms in this clause are not applicable to domestic service workers.</p> <p>b) Give preference to, given equal circumstances, Guatemalans over foreign nationals, and those who have done good work in the past to those who do not have this background;</p> <p>c) Protect all workers from physical or verbal abuse;</p> <p>d) Give workers the tools and materials necessary to perform the assigned task, making sure they are</p>	<p><b>Added to Article 61:</b></p> <p>o) When any worker reports an incident of sexual harassment, a mixed committee will be created within three days after the complaint is made. The committee will include two employers' representatives and two representatives proposed by the requesting person. Within one month, the committee must receive and investigate the complaint, make a decision on the obligatory measures to be taken so that the harassment ceases, and proceed in a fast, impartial way, respecting the rights to action and defense. When the committee or complaining person requests it, a labor inspector can also be included as a member of the committee.</p>
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good quality, and replacing them as soon as they are not working well (in all cases when the employer has not established that the workers will use their own tools);

e) Provide a local space where workers can store their tools when it is necessary for them to be kept in the place where services are provided. In this case, the tools will be registered when the worker requests it;

f) Permit labor authorities to inspect the company to verify the compliance of the Code's clauses and the social security laws, and provide these authorities with the necessary reports that they request. In this case, the employers can ask the authorities to show their credentials. During the inspection, one or two coworkers can represent the workers;

g) Pay workers the corresponding salary according to the time lost when it is impossible to work due to the fault of the employer;

h) Allow workers the time necessary to vote in popular elections, without reducing their salary;

i) Deduct from the worker's salaries the dues for paying the union or cooperative, as long as the worker or the legally constituted organization makes the request. In this case, the union or cooperative must prove its legal status, and follow the procedure established by the Labor Department to deduct the dues from the workers' salaries. The union or cooperative must demonstrate that the dues are authorized by its statutes, or, in the case of extraordinary quotas, by a general assembly;

j) Use all means possible to teach literacy to workers who are illiterate;

k) Maintain a sufficient number of chairs where workers can rest at the appropriate times, in

commercial or industrial establishments where the nature of the work allows it;

l) Give all farm workers who live on the farm where they work the necessary firewood for domestic consumption, as long as the farm produces a quantity greater than what the employer needs for the normal usage of the respective company. The forestry laws must be complied with, and the employer can choose to give cut wood or to show the workers where they can cut their own wood and with what precautions they should do so (to prevent damage to persons, crops, or trees);

m) Allow farm workers who live on the farm where they work to take the necessary water for their domestic use and for their animals from the ponds, springs, or pools; allow them to use the natural pasture of the farm to feed their animals (according to the contract, which also tells workers to keep their pigs tied up and their birds inside the fence provided on the farm, as long as this does not hurt the animals and as long as the labor or sanitation authorities do not make a contrary decision); and that the workers be allowed to use the non-cultivated fruit found on the farm that the employer does not normally use (as long as the worker limits himself to taking the amount he and his family can personally consume);

n) Allow farm workers to use the fruits and products of the parcels of land given to them;

o) Give paid leave to workers in the following cases:

1. When the worker's partner, spouse, parent or child dies: 3 days
2. When the worker marries: 5 days
3. Birth of a child: 2 days



<p>4. When the employer expressly authorizes other leave days and has said that they will be paid.</p> <p>5. To respond to court summons (not to exceed one half day within the jurisdiction, or one day outside of the department).</p> <p>6. To carry out union activities (limited to members of the executive committee): maximum of 6 days in the same calendar month for each member. However the employer can give unpaid leave to these members of the executive committee for a longer time.</p> <p>7. In all other cases specifically referred to in the collective bargaining agreement.</p>	
<p><b>Article 62</b></p> <p>Prohibits employers from:</p> <p>a) Demanding that workers buy their food from certain establishments or persons;</p> <p>b) Demanding or accepting money or other compensation from workers to allow them to work or for any other privilege related to working conditions.</p> <p>c) Obligating workers, by any method, to resign from unions or legal groups that they belong to, or to join another;</p> <p>d) Influencing workers' political decisions or religious convictions;</p> <p>e) Holding workers' tools or other objects as a guarantee;</p> <p>f) Making or authorizing obligatory collections from workers, except those taxes authorized by law;</p>	<p><b>Added to Article 62:</b></p> <p>i) Sexually harassing workers inside or outside of the company, or allowing or tolerating sexual harassment in the workplace:</p> <p>Employers who harass or tolerate harassment will be sanctioned with a labor fine for violating this express prohibition, without detriment to the penal, civil or other responsibilities that they incur.</p> <p>Sexual harassment is any act, repeated comment or behavior, of a sexual, sexist, homophobic, or misogynistic character that is unwanted by the recipient and when the perpetrator is in a position of hierarchical superiority or authority with respect to the victim.</p> <p>The prohibition of sexual harassment and the tolerance of harassment, established in clause i) of this article, extends to the employer's representatives and relatives.</p>

<p>g) Directing workers or allowing workers to be directed by someone who is intoxicated or under the influence of drugs or any other abnormal condition;</p> <p>h) Doing anything else that restricts the workers' legally established rights.</p>	
<p><b>Article 64</b></p> <p>Workers are prohibited from:</p> <p>a) Abandoning work during their working hours without just cause or permission from their employer or immediate boss;</p> <p>b) Doing political propaganda or propaganda contrary to the democratic instructions created by the Constitution, or doing anything coercive that hurts freedom of belief.</p> <p>c) Working while intoxicated or under the influence of drugs, or any similar abnormal condition;</p> <p>d) Using the tools provided by the employer for something other than what they are normally intended;</p> <p>e) Carrying any class of weapon during the working hours or inside the establishment, except in special cases authorized by law, or when they are cutting tools used for the job;</p> <p>f) Committing acts or violating labor norms that constitute acts of sabotage against the company's normal production.</p> <p>Violation of these norms should be punished as established in Article 77, clause h), or Articles 168 (second paragraph) and 181, clause d).</p>	<p><b>Added to Article 64:</b></p> <p>g) Sexually harassing a coworker, inside or outside of the company. Article 62 of this Code defines harassment.</p>
<p><b>Article 147</b></p> <p>Work by women and children should be</p>	<p><b>Adding a paragraph to Article 147:</b></p> <p>Those who hire minor children should guarantee</p>

appropriate to their age, physical condition, and moral and intellectual development.	their health, safety and morals, as well as adequate professional instruction specific to the job.
<p><b>Article 149:</b></p> <p>The ordinary working day indicated by Article 116, paragraph 1, should be decreased for minors as follows:</p> <p>a) By 1 hour daily and 6 hours weekly for those older than age 14.</p> <p>b) By 2 hours daily and 12 hours weekly for those age 14 or younger (as long as Article 150 authorizes their work).</p> <p>It is understood that, in compliance with Article 150, a further decrease in working hours can also be authorized.</p>	<p><b>Reformed Article 149:</b></p> <p>The ordinary daily working shift for minors cannot exceed 6 hours/day or 32 hours/week. Night shifts, overtime, and mixed shifts are prohibited for underage workers. Employers and their representatives who directly or indirectly benefit from the work of minors are responsible for monitoring compliance with age and hour limits as well as with other applicable labor norms. They will be collectively and individually responsible for the damage that their incomppliance can cause minor workers, as well as for the payment of sanctions for violating labor laws, and for the indemnification established in the last paragraph of Article 32 of this Code.</p>
<p><b>Article 150</b></p> <p>The General Labor Inspectorate can provide written authorization, in cases of exception, to allow the labor of children under age 14. It can also reduce, totally or partially, the hours established by the previous Article.</p> <p>The following must be shown:</p> <p>a) That the minor will be working as an apprentice, or needs to support the family due to the extreme poverty of his parents or guardians;</p> <p>b) That the work is light in terms of duration and intensity, is compatible with the minor's physical, mental and moral health, and</p> <p>c) That the obligatory education requirement is somehow met.</p> <p>In each of the authorizations, the minimum protection conditions for child workers must be listed clearly.</p>	<p><b>Reforms Article 150:</b></p> <p>Prohibits dangerous work and the worst forms of child labor.</p> <p>These include any activity, job or task performed by those under age 18 which, by its nature or the working conditions, damage or will probably damage the health, safety, or physical, mental, spiritual, moral or social development of minors and prevent them from developing with dignity. These jobs include, but are not limited to: all forms of slavery or analogous practices, including the sale and trafficking of children for use in armed conflicts; the use or offer of children for prostitution; the production of pornography or pornographic acting; the use of child labor in the fireworks industry, quarries; the use or offer of children for illegal activities, especially the production and trafficking of narcotics. The fact that the work is independent or family-based, unpaid or not resulting in economic benefits for a third person, do not constitute circumstances that prevent such work from being labeled dangerous or one of the worst forms of child labor.</p>

	<p>If this prohibition is violated, the minor still has his or her right to receive salary and other labor benefits for the work done, in addition to the indemnification established in the last paragraph of Article 32 of this Code, without detriment to the penal, civil or other responsibilities that the violators incur.</p>
<p><b>A new article was added to the Labor Code through Decree 1441.</b></p>	<p><b>Article 8:</b></p> <p>“Domestic labor” in the 4<sup>th</sup> chapter of the Labor Code was replaced with “Work in Private Homes”. All Labor Code clauses that refer to “domestic workers” and “domestic work” are thus modified to say “workers in private homes” and “work in private homes”.</p>
<p><b>Article 164</b></p> <p>Domestic workers are not subject to the hours or shift limits. Articles 126 and 127 are not applicable either.</p> <p>However, these workers enjoy the following rights:</p> <ul style="list-style-type: none"> <li>a) They should enjoy a minimum and obligatory rest of 10 hours/day. Eight of these must be during the night, and continuous, and 2 are for meals.</li> <li>b) On Sundays and Holidays these workers should enjoy an additional 6 paid hours of obligatory rest.</li> </ul>	<p><b>Reformed Article 164:</b></p> <p>People who work in private homes enjoy the same rights and benefits of other workers, as established in the Constitution and other labor and social security laws.</p>

**X. OBSTACLES IN THE ADMINISTRATION OF JUSTICE – POINTS OF VIEW FROM DIVERSE SECTORS ON THE QUESTION OF LABOR JUSTICE:**

**A. FROM THE MINISTRY OF LABOR:**

Problems arising when a collective socio-economic conflict is presented to the labor courts:

- Lack of observance of principles such as the right to work and protection.
- The groundless refusal to process the resolution of collective socioeconomic conflicts, saying that it should go to an ordinary labor court.
- The constant notation of requirements not found in the labor code regarding the initiation of collective conflicts of a socioeconomic character, which denied the exercise of this right and delays the proceedings.
- The admission of things that parties use to delay the process, despite the fact that the law establishes that they are inadmissible.
- Lack of compliance with the final deadlines established by law, and the violation of due process when the parties are not called before the conciliation or arbitration courts. This turns into incidents of retaliation, or requests to authorize the termination of work contracts, complaints regarding dismissals, and a series of legal strategies that have an effect on the administration of the General Labor Inspectorate.

**B. FROM THE JUDICIAL INSTITUTION:**

- The excessive workload, which does not permit strict compliance with the legally set time limits
- In cases of appeal, the process can be slow because all of the magistrates in that particular court must read and review the file, because the appeal is a collective decision
- In cases of seizures of bank accounts, in trying to carry out sentences that have been issued, in 75% of the cases there is collusion between people representing the banking institution and the account holders.
- The bank informs the judge of an existing bank account in the defendant's name, but these often have a low or nonexistent balance.
- Real estate cannot be seized, because the defendants have transferred their real estate. When it has to do with a commercial property, the goods are registered in the name of one of the shareholders.
- When the defendant is the State, they generally seek protection under the law, and this process takes 1-2 years in the Constitutional Court. During that time, the company closes or change identity, and the plaintiff is left with no remedy.
- The lack of training in the field of labor law and the lack of preparation in interpreting the norms are also problems.
- It is necessary to increase the budget for the judicial branch and create more courts in the different branches of law.

### **C. FROM THE CHAMBERS OF THE COURT OF APPEALS FOR LABOR:**

The primary problems observed in these courts:

- Clear protectionism towards judges in the labor courts
- The informal confirmation of all resolutions made against the workers, without taking into account the workers' allegations.
- The judges issue resolutions that are devoid of reasoning and that distort the workers' allegations and further avoid issuing resolutions on those allegations, limiting themselves to establishing that "the resolution follows the Law and therefore is supported." A clear example are the resolutions that consider that violations of the collective agreement on working conditions should be addressed in the ordinary labor court in application of a norm that sets the competence of the labor courts applying Article 292 a) of the Labor Code in detriment of the norms contained in Article 242 of the same legal body that regulates the procedures for strikes in those cases. The right to declare a strike cannot be requested in an ordinary labor court, so that this procedure denies the right to strike.
- In the cases of reinstatement, the chambers retain final judgement to wait for the employer to file an appeal. This demonstrates protection of employers.
- In some cases, alternate magistrates advise companies and then later hear the cases they helped the companies with. This has been reported before the disciplinary authorities in the judicial branch and has even been made known to the Supreme Court. The disciplinary authorities have responded by saying that there is no impediment to these people acting as lawyers, given their role as alternates. We think that this attitude lacks ethics but it is accepted as normal by the Guatemalan judicial system.
- They fail to forward complaints made against judges of the first instance to the disciplinary bodies, despite the fact that workers expressly requested them to do so, which violates the law of the judiciary.
- In some cases, the judges set a hearing and notify the worker with less than 24 hours of advance warning.
- Non-compliance with the time frames established for the process of the second instancia.
- In some cases, judges accept evidence presented by the employers that has not been offered or object to for not being admitted in the first instancia.

### **D. APPEALS COURT, SUPREME COURT, AND CONSTITUTIONAL COURT:**

More general problems with the appeals process:

- The indiscriminate application of appeals as a result of the use of clauses from the Civil and Commercial Process Code, even when it is regulated that the norms regarding appeals will be those that will primarily govern the material on which the appeal is based.
- The courts' lack of knowledge about the norms and principles of labor law, which is evident in their application of these norms in appeals cases.

- The lack of compliance with time limites fixed by the *Ley de Amparo, Exhibición Personal y de Constitucionalidad*.
- Exaggerated delay of notifications.
- Refusal to give workers access information and records.
- Appeal courts' partiality in favor of the business sector or the state.
- Appeal courts' lack of credibility.
- Avoidance of making a legal resolution that could lead to penal action against one of the judges or officials of the Guatemalan judicial system.

## **E. FROM THE LABOR UNIONS**

The following is a summary of the obstacles that the unions identified:

- Most judges (with a few honorable exceptions) have a lack of knowledge regarding labor law and its principles that leads to problems with its application.
- Judges' lack of knowledge regarding the international labor conventions that are in effect in Guatemala, evident by the fact that they are not applied.
- Decisions that abuse the application of the judicial criteria, so far as to contradict the norm's express text.
- Judges' protection of employers, especially in cases of social economic collective conflicts.
- Granting suspension effects to appeals that legally do not have such effects, as in the case of the Nullity Appeal.
- Judges' active participation in convincing workers to renounce their rights or accept employers' offers.
- The illegal substitution of "judicial collective conflicts" for "social economic collective conflicts" when dealing with violations of the collective bargaining agreement. This contravenes the meaning of Article 242 of the Labor Code, and denies workers the right to strike.
- Obstruction of due process in social economic collective conflicts through the requirement of things not regulated by law.
- Courts' unwillingness to pass effective precautionary measures to protect workers' rights
- Courts' lack of firmness at the time of issuing resolutions, especially regarding the reinstallation of dismissed workers.
- Internal disciplinary entities' over protection and paternalism towards judges.
- Failure to comply with the final deadlines established by labor laws.
- Failure to use conciliation and arbitration courts, allowing employers to use delay strategies to slow the process and retaliate against the workers.
- Courts' unwillingness to make managers of corporations personally responsible, even though there is a legal basis for doing so.
- Courts' unwillingness to declare legal fraud or the nullity of pleno derecho in cases where these exist.

- Judges' limits on the concept of "retaliation," sending aspects like the retention of union dues, salaries, bonuses, etc, to the ordinary court, feeling that the concept of 'retaliation' entails the violation of the law and the court that it should be addressed in is determined by the location.
- The establishment of prerequisites, without legal basis, in the legal processes regarding labor issues.
- The concept of labor flexibility predominates in most courts.
- The avoidance, without legal basis, in collective socio economic conflicts, of the procedure to reinstate workers fired indirectly.
- The indiscriminate authorization to end work contracts in collective socio economic conflicts even when it affects the right to work itself as established in Article 101 of the Constitution.
- The avoidance of the established process for reinstating workers who were fired during the formation of a union.
- The excessive delays in coming to a decision and issuing a notification.
- The avoidance of responsibility for failing to comply with legally established deadlines by manipulating the dates of the resolutions to make it appear that they were issued within the time period required by law.
- Refusal to let workers access records, which are sometimes hidden away when it is in the employers' interest.
- The interpretation of "conciliation" in a way that is adverse to the idea of workers' inalienable rights.

#### **F. FROM THE PRIVATE SECTOR (CACIF)**

- The filing of frivolous appeals that only seek to slow the process.
- Judges will favorably resolve workers' petitions not because of the law but because they are pressured and afraid of retaliation by union leaders.
- Many judges do not have the full knowledge to be able to apply justice. They confuse the principle of the tutelaridad of the law, thinking that it means always resolving a conflict in favor of the worker.
- The judges' officials (public employees), not the judges, hear the case.
- The diverse judicial criteria used to issue sentences.
- When judges or officials violate the law, and complaints are filed before the disciplinary bodies, the process encounters obstacles, because it looks for justification of the violation. The decisionmakers attend to particular interests or issue a decision in favor of the accused judicial official or assistant, because they want to receive a similar decision if they face the same accusation in the future.
- There is a need for more labor courts, because the courts are currently so overworked that it is hard for them to speed up the process and fulfill the legally set time limits.
- Inmediación procesal is one of the most important principles in any process, but it is not complied with.
- Judges and magistrates need more training.



## **XI. THE COLLECTIVE BARGAINING PROCESS**

In the Labor Code, there are three basic processes for the resolution of conflicts. These are:

- Arreglo Directo (Art. 374 -376)
- Conciliation (Art. 377 -396)
- Arbitration (Art. 397 - 408)

*Arreglo Directo*, or the direct method, is not often used by workers because it is a process that takes place between workers and the employer, without the intervention of labor authorities. In most cases, instead of negotiating with their workers, employers use threats, intimidation or dismiss workers. In practice, therefore, conciliation and arbitration are more commonly used.

These mechanisms imply the right to be free from dismissal, which means that the employer cannot terminate any work contract without the authorization of the respective judicial authority. Indeed, Article 380 establishes that the judge will immediately order the reinstatement of the dismissed worker. In such cases, the court should issue the resolution stating that the worker should be reinstated within 24 hours. This same resolution will arrange for one of the court officials to be the executor of the resolution, making the reinstatement effective.

### *1. The Arreglo Directo*

- The Collective Agreement proposal is presented to the employer through the administrative authority (General Labor Inspectorate) (Article 51).
- If an agreement is reached, 3 copies are signed (Article 52). One copy is sent to the Ministry of Labor for its official approval.
- If an agreement has not been made within 30 days of the presentation of the request, a collective conflict can be presented to the labor court (Articles 51 and 377 - 380).
- The ad-hoc or permanent councils or committees composed of no more than 3 workers present their complaints and requests to the employers or their representatives in verbal or written form (Article 374).
- Within the five days following their constitution, the workers should inform the General Labor Inspectorate (Article 376).
- The employer or his representative cannot refuse to receive them as soon as possible (Article 374).
- If they reach an agreement, an official report is drawn up (Article 375). The employers or workers will send an authentic copy to the General Labor Inspectorate for its approval within

24 hours of it being signed (Articles 278 and 375).

- If an agreement is not reached, the workers can turn to conciliation (Articles 377 and 381).

## *2. Conciliation Process*

- The union's Executive Committee, the Ad-Hoc Committee or allied group of workers present the conflict to the labor court (Articles 377, 378 and 381)
- When the judge receives the complaint, he/she determines whether it fulfills the legal requirements (Article 381).
- The judge will then issue a resolution starting the process on the request and ordering the parties not to retaliate against each other. (Articles 379, 380 and 381).
- The other party is notified so that it can name 3 delegates within 24 hours. If it does not do so, the judge will name the delegates (Articles 377 and 382).
- During the next 12 hours after the receipt of the petitions, the judge will establish the conciliation tribunal, which will include the labor judge, who will preside over the matter (Articles 293, 294 and 382). The conciliation tribunal will also include one worker's representative and 3 alternates, one employer's representative and 3 alternates, and the secretary of the tribunal (Article 293). They will immediately meet and call both delegations to appear in court within the next 36 hours (Article 384).
- In the first appearance, the conciliation tribunal will hear the delegates separately. Once it has determined the objectives of the two parties, it will call the delegates and propose general plans to come to an agreement (Article 385).
- If there is an agreement, the parties will be obliged to sign and comply with it (Article 386).
- If they do not agree, the court can repeat the procedure from Article 385 within the next 48 hours (Article 387).
- Second hearing: The conciliation court will hear the delegates separately again, repeating the same procedure undertaken in the first hearing. If the disagreements persist and they do not go to arbitration, the court will write a report and send a copy to the General Labor Inspectorate (Article 389). The conciliation process thus ends here (Article 386 and 389).
- The conciliation process can never last more than 15 days starting from the moment when the labor judge receives the petitions (Article 393).

## *In the Private Sector*

If conciliation ends without the parties having agreed to go to arbitration, the workers have the following options:

- Within 24 hours of the failure of the conciliation, the workers can ask the judge to declare a legal strike (Articles 239, 241 and 394).
- In the case of essential public services, the judge will call the parties to a hearing to establish emergency shifts of 20-30% of the workers. If the parties don't agree, the judge will determine the shifts during the next 24 hours (Article 243).
- The judge orders the General Labor Inspectorate to verify that 50% + 1 of the workers approve the strike (Article 241). They should also verify that the requirements have been filled. A resolution is then issued on the legality or illegality of the strike (Articles 239, 241 and 394).
- The judge immediately discusses the resolution with the labor appeals court (Article 394)
- The Labor Appeals Court will issue a pronouncement on the strike within 48 hours (Articles 239, 241 and 394).
- The workers have 20 days to go on strike once the Court has declared it to be legal (Articles 239, 394 and 395)
- At the request of the interested party, the judge can arrange the closure of the establishment that the conflict affects in order to respect the right to strike and protect persons and property (Article 255).
- If the strike is not declared by the time the 20 days are up, the parties must go to obligatory arbitration (Articles 395 and 397).

#### *In the Public Sector*

When the conflict involves state workers and its decentralized and autonomous entities that provide essential public services, the judge will turn the conflict over to obligatory arbitration, according to Article 4 of the Law of the Unionization of State Workers and Article 397 of the Labor Code. When the conflict does not involve workers that provide essential public services, the workers employ the same procedures as workers in the private sector.

## XII. ANNEX OF PERSONS INTERVIEWED FOR THIS REPORT

REPRESENTATIVE	TITLE	INSTITUTION
Carlos Mancilla	Secretario General	Confederación de Unidad Sindical Guatemalteca (CUSG)
Jorge Estrada y Estrada	Coordinador de la Comisión de Asesoría Jurídica de la Unión sindical	Unión Sindical de Trabajadores de Guatemala (UNSITRAGUA)
Vicente Bámaca	Coordinador del Proyecto de Asesoría Sindical	Area de Derechos Económicos Laborales (ADECOL) del Centro para la Acción Legal en Derechos Humanos (CALDH)
David Morales	Secretario General de FESTRAS	Federación Sindical de Trabajadores de la Alimentación, Afines y Similares (FESTRAS)
Sandra Eugenia Mazariegos	Jueza Cuarto de Trabajo y Previsión Social	Corte Suprema de Justicia
	Juez Segundo de Trabajo y Previsión Social (Interino)	Corte Suprema de Justicia
Hugo Calderon	Director de la Procuraduría de la defensa del Trabajador	Ministerio de Trabajo y Previsión Social
Julio Cesar Quiróa Higueros	Inspector General de Trabajo	Ministerio de Trabajo y Previsión Social
Edgar Sánchez	Sub – Inspector de Trabajo.	Ministerio de Trabajo y Previsión Social
Thelma De León	Jefa del Departamento de Higiene y Seguridad	Ministerio de Trabajo y Previsión Social
Alejandro Argueta	Abogado Laboralista	